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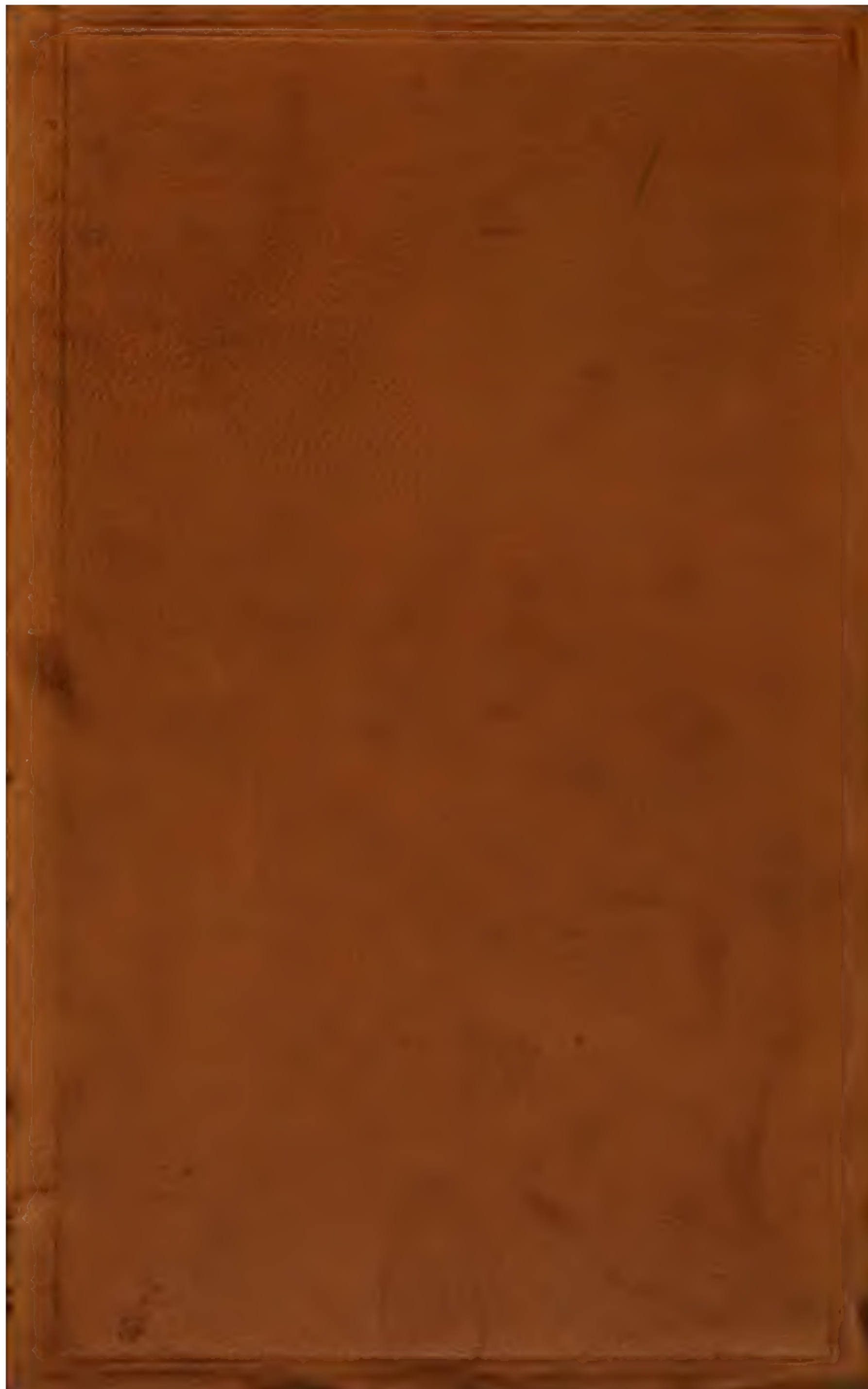
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RAILROAD REPORTS

(Vol. 53 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT.

IN THE
IN THE
IN THE

UNITED STATES.

EDITED BY


THOMAS J. MICHIE.

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RAILROAD REPORTS

PENNSYLVANIA R. CO. *v.* FORSTALL.

(Circuit Court of Appeals, Second Circuit, January 7, 1908.)

[159 Fed. Rep. 893.]

Writ of Error—Direction of Verdict—Review.—On review of an order declining to direct a verdict for defendant, the Circuit Court of Appeals must examine the evidence from a viewpoint most favorable to plaintiff.

Master and Servant—Injuries to Servant—Railroads—Assumed Risk—Promise to Repair.*—Plaintiff was employed as a brakeman in defendant's railroad yard, and required to assist in placing cars with a switch engine, to which a push pole was attached with a collar and chains, to prevent the pole from swinging too far to the side. The collar had been in a defective condition for some months prior to the accident, and plaintiff in various ways had attempted to prevent its slipping, without success, when he complained to defendant's agent, who promised that the collar should be fixed the next time the engine went to New Jersey. A few days after this promise was made plaintiff injured his hand, and was prevented from performing his regular duties, and had not worked again with such engine until just before the moment of the accident, when, as he was riding on the rear of the engine, "drilling" cars by means of the pole, it swung too far off the track, and struck a car on an adjoining track, and was forced back against plaintiff, causing his injuries. Held, that plaintiff was justified in remaining a reasonable time after the promised repairs, and in assuming that the repairs had been made in his absence, and that he therefore did not assume the risk, in the absence of proof that he knew that the promise to repair had not been fulfilled.

Same—Instructions—Refusal.—Where there was evidence of a promise to repair a defective push pole attached to an engine, by which plaintiff was injured, and there was no evidence that plaintiff knew the repairs had not been made at the time of the accident, a request to charge that if plaintiff knew the pole was out of order, and if more than a reasonable time to repair it had elapsed after plaintiff had notified defendant of the defect before the accident, and no repairs were made, he assumed the risk therefrom by remaining in the service, was properly refused, as ignoring the distinction between

*See foot-note appended to *Boney v. Atlantic & N. C. R. Co.* (N. Car.), 26 R. R. R. 609, 49 Am. & Eng. R. Cas., N. S., 609; *Britt v. Carolina N. R. Co.* (N. Car.), 26 R. R. R. 453, 49 Am. & Eng. R. Cas., N. S., 453.

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knowledge that the pole was defective and knowledge of the danger to be apprehended from its use, and as failing to hypothesize that plaintiff knew the repairs had not been made.

Same—Pleading—Promise to Repair.—Where a complaint charged that defendant failed in its duty as an employer and furnished unsafe appliances, and defendant, without pleading it, was permitted to offer evidence to show that plaintiff assumed the risk of the dangerous appliance, plaintiff, without specific pleading, was properly permitted to show a promise to repair, which merely negated the assumption of risk; plaintiff not being required to negative assumption of risk in his complaint.

Same—Negligence.—Where plaintiff, a railroad brakeman, was injured by a defective push pole, which defendant furnished and knew was unfit for use, defendant was negligent in failing to perform its duty to furnish safe appliances, notwithstanding an extra pole not shown to have been in good condition was in the yard; it being the duty of defendant, and not plaintiff, to install such extra pole on the engine.

Same—Cause of Accident—Contributory Negligence—Question for Jury.—In an action for injuries to a brakeman, whether the accident was caused by the slipping of a collar attached to a push pole on the engine, or by the negligence of plaintiff and his fellow servants, held for the jury.

Same—Inspection—Duty of Master.†—A switch engine was operated with a heavy push pole, secured to the engine by bolts and supports, as well as by chains attached to a collar thereon. The collar was defective, and required more than a mere ordinary adjustment, and plaintiff, a brakeman on the engine, prior to his injury by reason of the defect, tried without avail to repair it, whereupon defendant's agent promised to send it away for repairs. Held, that such appliance was not one requiring constant renewal and adjustment on account of daily wear and tear, and that it was the railroad company's duty to inspect the same.

In Error to the Circuit Court of the United States for the Eastern District of New York.

Writ of error to review a judgment entered upon the verdict of a jury in favor of the defendant in error, who was the plaintiff below. In the opinion the parties are designated as in the court below.

Robertson, Biddle & Benedict (N. B. Beecher, of counsel), for plaintiff in error.

D. R. Almy, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This was an action to recover damages

†See foot-note appended to *Alves v. New York, etc., R. Co.* (R. I.), 27 R. R. R. 193, 50 Am. & Eng. R. Cas., N. S., 193.

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for personal injuries received by the plaintiff, an employee of the defendant, through its alleged negligence. The plaintiff having recovered judgment in the court below, the defendant has brought this writ of error. We may conveniently consider the question raised in the order of the points in the defendant's brief.

The defendant's first point is that a verdict in its favor should have been directed, because the plaintiff assumed the risk. The inquiry under this point necessarily involves an examination of the facts from a viewpoint most favorable to the plaintiff. We may therefore state the following as facts which the jury were warranted in finding from the evidence.

The plaintiff was employed by the defendant in its Brooklyn yard as a brakeman, but with certain additional duties with respect to the placing of cars. At the time of the accident he was riding on the rear end of a switch engine, which was "drilling" cars. The tracks in the yard had such sharp curves that it was impossible for cars to pass around them with ordinary couplings. To obviate this difficulty the rear end of this switch engine was fitted with a push pole eight feet in length, fastened so as to project horizontally, and prevented from swinging too far to each side by chains attached to an iron collar around the pole. This collar was worn, and before the accident had sometimes slipped upon the push pole. When it slipped, it permitted the pole to swing farther to each side than was intended. It slipped immediately before the accident, and this time the pole swung so far off the track—the engine going around a curve—as to come in contact with a car upon an adjoining track. The pole was thus forced back upon the plaintiff, squeezing his leg, and causing the injuries complained of. The collar upon the push pole had been in a defective condition for some months previous to the accident. The plaintiff had tried in various ways to prevent its slipping, but without effect. About a month before the accident he complained to the defendant's agent, his superior, about the trouble, and the agent promised that the collar would be fixed the next time the engine went to New Jersey. The engine was sent to New Jersey, but nothing was done to the collar. A few days after this promise was made the plaintiff injured his hand, which prevented him from performing his regular duties. He was about the yard, but did not work on this engine until just before the moment of the accident. It did not appear that the plaintiff, when he then went upon the engine, knew that the defendant's agent had failed to keep his promise to repair the collar.

These facts fall short of showing that the plaintiff was assuming the risk at the time of the accident. Even if his knowledge of the defect amounted to knowledge of the danger, so that he once had assumed the risk, his position was changed by the defendant's promise to repair. The jury were warranted in finding that after this promise was made the plaintiff continued in his

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employment relying upon it, and not taking upon himself the risk. This he had a right to do. He was justified in remaining a reasonable time for the promised repairs to be made. If he knew that they were not made within such time, he took his chances if he remained longer. But such knowledge is not shown. As we have seen, it does not appear that the plaintiff, when he returned to work upon the engine immediately before the accident, knew that the defendant had failed to keep its promise to repair. There can be no inference that the plaintiff did not rely upon the performance of the promise, and assumed the risk, unless he knew that the promise had not been fulfilled.

The defendant's second point is that the trial court erred in refusing to charge, as requested, that:

"If the plaintiff knew that the pole was out of order, if more than a reasonable time to repair it had elapsed after he notified the defendant before the accident, and no repairs were made, he assumed the risk therefrom by remaining in the service."

The request as a whole did not correctly state the law. It ignored the distinction between knowledge that the pole was out of order and knowledge of the danger to be apprehended from its use. It also failed to state that the plaintiff knew the repairs had not been made. As we have just seen, it is not so much a question of remaining after promised repairs have not in fact been made as of remaining after knowledge that they had not been made.

In its third point the defendant claims that the trial court erred in permitting the plaintiff to prove that the defendant promised to repair, in the absence of any allegation to that effect in the pleadings. The complaint charges that the defendant failed in its duty as an employer and furnished unsafe appliances. The defendant, without pleading it, was permitted to offer evidence to show that the plaintiff assumed the risk of the dangerous appliance. Whether this practice was correct we need not now determine. But certainly the plaintiff then, without specific pleading, had the right to show that the defendant promised to repair. This was in no sense a promise which the plaintiff was seeking to enforce. It merely negatived the assumption of the risk. It showed that the plaintiff in continuing to work did not intentionally take upon himself the danger, but relied upon the defendant's promise to repair. The plaintiff in his complaint was not obliged to show that he did not assume the risk. A fortiori he was not bound to show why he did not assume the risk.

The defendant's fourth point is that a verdict should have been directed in its favor because it fulfilled its entire duty as master. The duty of the defendant was to use reasonable care to furnish the plaintiff safe appliances with which to work. The jury were warranted in finding from the evidence that the push pole furnished by the defendant was unfit for use and that the defendant

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knew of it. The fact that an extra push pole was at the yard did not meet the defendant's obligations. It was its duty, and not the plaintiff's, to install it upon the engine. Moreover, it does not clearly appear that the spare pole itself was in good condition.

The fifth point urged by the defendant is that the court erred in submitting to the jury the question whether the accident was caused by the slipping of the collar upon the push pole. There was, however, testimony that the collar slipped just before the accident and allowed the pole to swing. With this evidence in the case, the question whether such slipping caused the injury was most properly submitted to the jury.

The defendant's sixth point is that the verdict should have been directed in its favor because the true explanation of the accident was the gross negligence of the plaintiff and his fellow servants. The true explanation of the accident was for the jury to find. We cannot say from the testimony that they were bound to find contributory negligence or the negligence of co-employees. It is true that the plaintiff directed the placing of the car which the pole struck on No. 3 track. But it does not appear that he designated its precise location, nor that its location was dangerous, had the pole not swung. So it does not appear that the plaintiff, when riding upon the engine, could in any way have prevented the heavy pole from swinging when the collar slipped.

In its seventh point the defendant claims that the court erred in refusing to charge that there was no duty upon the defendant to inspect the push pole. As a general rule it is the duty of a master to properly inspect the appliances used by his servants for the purpose of discovering defects. An exception to this rule exists in the case of appliances, not of a permanent nature, which require constant renewal and adjustment on account of daily wear and tear. There the master does his duty when he furnishes a supply of these appliances and the means by which the servants may adjust and repair them. But this was not a case of a simple appliance not of a permanent nature. The push pole was a heavy appliance of wood and iron, secured to the engine by bolts and supports, as well as by chains attached to the collar; and the slipping collar required more than a mere ordinary adjustment, which the plaintiff or his fellow servants were bound to make. In fact, the plaintiff tried without avail to fix it, and the defendant's agent promised to send it away for repairs. The trial court correctly refused to charge that the defendant owed no duty of inspection.

There is no error, and the judgment of the Circuit Court is affirmed.

BEACH v. BIRD & WELLS LUMBER CO.

(Supreme Court of Wisconsin, May 8, 1908.)

[116 N. W. Rep. 245.]

Master and Servant—Injury to Servant—Fellow Servants.*—The negligence of the engineer, in insufficiently repairing the hand hold on an engine tender, was not that of a fellow servant of a brakeman, injured thereby, the repairs not being made in the progress of the work while the engineer and brakeman were at work, but having been made at night, at request of the superintendent, after the day's work of the brakeman was over.

Same—Contributory Negligence—Question for Jury.†—Where the footboard and hand hold of an engine tender being broken, a brakeman, at the end of the day, requested, and was promised by the superintendent, that they should be repaired, and during the night a new footboard was put in, and the hand hold repaired, but insufficiently, the question of contributory negligence of the brakeman, in using the hand hold the next day without a close inspection, the tender presenting the appearance of being repaired, is a question for the jury.

Same—Evidence.—Contributory negligence of a brakeman is not conclusively established by the manner in which he attempted to get on the footboard, at the rear of an engine tender, while the train was in motion, by stepping, with one foot, on the oil box projecting from the center of the nearest car wheel, and swinging around the end of the tender, on its hand hold, to the footboard, in doing which the hand hold gave way, by reason of insufficient repairs; this not being shown to have been an unusual method, but there being testimony that the hand hold is used by brakemen when getting on such a footboard, and that such manner of getting on the footboard, on the occasion in question, was necessary, because the lumber on the car next to the tender overhung the end of the car, preventing getting on the footboard in any other way.

Same.—As bearing on the question of contributory negligence of a brakeman in using, without inspection, the hand hold of an engine

*For the authorities in this series on the question whether an engineer is the fellow servant of the other members of his train crew, see foot-notes appended to *Huggins v. Southern Ry. Co.* (Ala.), 24 R. R. R. 518, 47 Am. & Eng. R. Cas., N. S., 518; foot-notes appended to *Illinois Cent. R. Co. v. Quirey* (Ky.), 20 R. R. R. 162, 43 Am. & Eng. R. Cas., N. S., 162; foot-notes appended to *Pearsall v. New York, etc., R. Co.* (N. Y.), 27 R. R. R. 452, 50 Am. & Eng. R. Cas., N. S., 452, foot-notes appended to *Lyon v. Charleston & W. C. Ry.* (S. Car.), 26 R. R. R. 443, 49 Am. & Eng. R. Cas., N. S., 443.

†See second foot-note appended to *Pugmire v. Oregon Short Line R. Co.* (Utah), 27 R. R. R. 660, 50 Am. & Eng. R. Cas., N. S., 660; foot-notes appended to *Germanus v. Lehigh Valley R. Co.* (N. J.), 27 R. R. R. 622, 50 Am. & Eng. R. Cas., N. S., 622; *Southern Ry. Co. v. McGowan* (Ala.), 25 R. R. R. 353, 48 Am. & Eng. R. Cas., N. S., 353.

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tender, repairs of which had been promised and made, but insufficiently, testimony that he supposed, believed, or expected it had been bolted or riveted on, as it was before, and as it ought to have been, is relevant.

Same—Special Verdict.—The finding in the affirmative, in answer to the special interrogatory to the jury, whether the defective hand hold, by which plaintiff was injured, was “unreasonably dangerous” to him, negatived the fact of its being in a “reasonably safe” condition, and rendered unnecessary an interrogatory in regard thereto.

Same.—Where, in an action for injury to an employee from a defective hand hold, the special interrogatories, “Was the condition of the hand hold such as to make it apparent to one knowing its condition that it was dangerous to use?” and “Did the plaintiff, on the day of, and before, the accident, know of the dangerous condition?” were submitted, and the jury answered the latter in the negative, defendant cannot complain that the former was unnecessary.

New Trial—Excessive Damages.—The court in a personal injury case, in which the verdict is excessive, may grant a new trial, conditionally on defendant not electing to consent to a judgment for the maximum amount an unprejudiced and impartial jury might award, or plaintiff not electing to take judgment for the minimum amount such a party might award; such maximum and minimum amounts being fixed by the court by ascertaining what such juries have done in similar cases, and what amounts have been held to be excessively large or small.

Appeal from Circuit Court, Marinette County; Samuel D. Hastings, Judge.

Action by Louis Beach against the Bird & Wells Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Among other references upon the part of the appellant were the following: Sweet v. Ohio C. Co., 78 Wis. 127, 47 N. W. 182, 9 L. R. A. 861; Faber v. C. Reiss Coal Co., 124 Wis. 554, 102 N. W. 1049; Albrecht v. C. & N. W. Ry. Co., 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 653; Kerrigan v. C., M. & St. P. Ry. Co., 104 Wis. 166, 80 N. W. 586; 2 Words and Phrases, 1319; McKivergan v. A. & E. L. Co., 124 Wis. 60, 102 N. W. 3332; McCarthy v. Whitcomb, 110 Wis. 113, 85 N. W. 707; Smith v. C., M. & St. P. Ry. Co., 91 Wis. 503, 65 N. W. 183; Ewald v. C. & N. W. Ry. Co., 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; Toner v. C., M. & St. P. Ry. Co., 69 Wis. 188, 31 N. W. 104, 33 N. W. 433; Rueping v. C. & N. W. Ry. Co., 123 Wis. 319, 101 N. W. 710; 13 Cyc. 135, and note 78.

Among other references upon the part of the respondent were the following: Wedgwood v. C. & N. W. Ry. Co., 44 Wis. 44; Brabbits v. Ry. Co., 38 Wis. 289; Welty v. Ry. Co., 100 Wis. 128, 75 N. W. 1022; Grams v. C. Reiss Coal Co., 125 Wis. 1, 102 N.

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W. 586; Hamann v. Mil. B. Co., 127 Wis. 550, 106 N. W. 10; Bigelow v. C., B. & N. Ry. Co., 104 Wis. 109, 80 N. W. Heddles v. C. & N. W. Ry. Co., 77 Wis. 228, 46 N. W. 115; Am. St. Rep. 106; Dugan v. St. P., M. & O. Ry. Co., 85 Wis. 609, 55 N. W. 894; Cummings v. Nat. F. Co., 60 Wis. 603, N. W. 742, 20 N. W. 665; Heath v. Stewart, 90 Wis. 418, 60 N. W. 1051; Baltzer v. C., M. & N. R. Co., 89 Wis. 257, 60 N. W. 716; Neilson v. M. & M. P. Co., 75 Wis. 579, 44 N. W. 147; Hinton v. St. Ry. Co., 65 Wis. 323, 27 N. W. 147; Ferguson v. Wis. Cent. Ry. Co., 63 Wis. 145, 23 N. W. 123; Nadau v. W. R. L. Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. Schmidt v. Mil. & St. P. Ry. Co., 23 Wis. 186, 99 Am. Dec. 3; Berg v. C., M. & St. P. Ry. Co., 50 Wis. 419, 7 N. W. 3; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777; Wysocki v. I. L. Co., 121 Wis. 96, 98 N. W. 950; Heer v. Warren-Schl A. P. Co., 118 Wis. 57, 94 N. W. 789.

Charles A. Vilas (E. C. Eastman, of counsel), for appellant
Wigman, Martin & Martin, for respondent.

TIMLIN, J. (after stating the facts as above). The defendant owns and operates a line of railroad in Marinette county in connection with its logging and lumbering business, and has for some time and to a limited extent been carrying freight and passengers for hire on said railroad. The plaintiff was employed by defendant acting as brakeman. On July 18, 1906, the footboard hand hold upon the engine tender of one of defendant's locomotives were damaged and broken in an accident. The plaintiff requested Mr. Hollenbeck, superintendent of defendant having authority to hire and discharge, to have the hand holds repaired. The latter promised to have them repaired. On the morning of July 19th when plaintiff went out to work upon his engine he noticed a new footboard on the engine and believed that the hand holds had been repaired, but did not inspect them or notice them particularly. Repairs had been made but the hand holds were insufficiently repaired, the principal one being merely tied on at the lower end with wire. Later in the day in attempting to get on the footboard in the rear of the tender while the engine was in motion and in the discharge of his duty the plaintiff caught this defective hand hold for the purpose of swinging himself on to the footboard. The hand hold gave way or swung loose, in consequence of which he fell so that the engine wheel ran over his foot, crushing it to such an extent as to require amputation of the foot, that, to quote the language of Dr. Bell, "He has the cuboid portion of the cuboid bone left. Practically all he has to stand on is the heel bone with the assistance of that portion of the scaphoid and half of the cuboid bone." As we understand this all the foot forward of the leg was amputated.

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The plaintiff was 23 years old, was earning about \$1.75 a day, had no trade or profession, and had five or six years' training in the common schools. The plaintiff had a verdict for \$20,000, and the trial court upon motion for a new trial, stating among other things that the damages awarded by said verdict were excessive, granted said motion conditionally, that is to say, regarding \$9,000 as the maximum amount for which an impartial jury would probably find a verdict for the plaintiff and \$5,000 as the minimum, he awarded to the plaintiff the option to take judgment for \$5,000 and costs, to the defendant the option to submit to judgment for \$9,000 and costs, and in case neither party exercised his option the verdict to be set aside and a new trial ordered. The plaintiff elected to take judgment for \$5,000 damages, and for this amount with costs, judgment was rendered in his favor.

The appellant contends that the proof shows the plaintiff to be guilty of contributory negligence because he went upon the engine on the morning of July 19th without ascertaining whether or in what manner the hand hold had been repaired, and that he was guilty of contributory negligence in the manner in which he attempted to reach the footboard at the time of his injury, and also because the handhold was repaired during the night of July 18th by the engineer at the request of the superintendent, and the engineer was a fellow servant with the injured brakeman. Unless the insufficient repair of the hand hold was the act of a fellow servant, there is little or no question of the negligence of the defendant because the repair in this respect was utterly insufficient. Appellant's counsel contends, first, that the defendant is a private logging railroad, and therefore not within the provisions of section 1816, St. 1898; second, that because this particular repair of the hand hold was made by the locomotive engineer and defectively made that the negligence was that of a fellow servant. We find it unnecessary to pass upon this first contention of appellant because on this second contention we are satisfied that notwithstanding the hand hold was repaired by the engineer the latter in so doing was performing a duty which the master owed to the servant. This was not a repair made in the progress of the work while the plaintiff and the engineer were at work. After the plaintiff's day's work was done and the damaged engine and tender were taken to the shop or place for repair the corporation could employ any person to make this repair, whether that person had been, during the day preceding and at other work, a fellow servant of the plaintiff or not. Under such circumstances and while making such repairs the person making the repairs was engaged in the discharge of a duty which the corporation owed to the plaintiff, and which it could not escape by delegating that duty to another person under the circumstances above indicated. *Grams v. C. Reiss Coal Co.*, 125 Wis. 1, 102 N. W. 586; *Wedgwood v. Ry. Co.*, 44 Wis. 44; *Barbbits v. R. R. Co.*, 38 Wis. 289. Clearly there was negligence on the part of the defendant.

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The question of plaintiff's contributory negligence was for the jury. On the day before the injury the plaintiff knew that the hand hold and other portions of the engine tender were broken, and he requested that the hand hold be repaired. The defendant's superintendent promised to have the repairs made. On the morning of the day of the injury when plaintiff resumed work the engine tender presented the appearance of having been repaired. A close inspection of the hand hold would no doubt have disclosed the manner and insufficiency of its repair. The plaintiff failed to make such inspection, but, assuming that repairs had been made as was promised and as would appear from a cursory examination, proceeded with his work. It was a question for the jury whether his conduct in this respect was that of an ordinarily prudent person. We cannot declare the contrary as matter of law. The manner in which the plaintiff attempted to reach the footboard while the train was in motion, by stepping with one foot upon the oil box projecting from the center of the nearest car wheel and swinging around the end of the tender on this hand hold to the footboard, is not shown to have been an unusual method; on the contrary, the plaintiff testifies that the hand hold is used by brakemen when getting on the footboard at the rear of the engine, and that it was necessary to get on to the footboard in this way on the occasion in question because the car load of lumber on the car coupled next to the tender overhung the end of that car so as to prevent getting on the footboard in any other way. The duties of the plaintiff required him to get on this footboard while the engine was in motion, and there is nothing in this testimony which tends to show that his manner of getting on the footboard at the time in question was so unusual or extraordinary as to conclusively establish contributory negligence on the part of the plaintiff.

Error is assigned upon the admission of evidence. The plaintiff having testified he had not used the hand hold on the day he was injured prior to the injury, and that he did not know the manner in which it had been repaired and had not noticed it, but that he knew that these hand holds were fastened by a bolt or rivet, the following question was asked: "Q. I ask you this, did you up to the time you were injured suppose that it had been bolted or riveted on as it was before it had been broken?" This was objected to as incompetent, irrelevant, and immaterial, calling for a mere supposition, and the objection overruled. The witness answered, "I expected it had been bolted or riveted on the same as it ought to have been." The question was leading in form, but not intrinsically objectionable. The word "suppose" is here used for "think" or "believe," or, as the witness answered, "expect." The question was whether he had a right to rest in that belief without inspection and examination. As the law casts on him no absolute duty of inspection or examination, it became a

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mere question of fact for the jury whether the course of conduct of ordinarily prudent persons would require such examination or inspection. The belief of the plaintiff that repairs promised had been made was relevant as bearing upon his omission to inspect. The court might have sustained the objection on account of the form of the question, but there is no reversible error in admitting the evidence.

It is contended that the special verdict was improperly framed because the third question, instead of asking the jury whether the hand hold was in a reasonably safe condition, inquired whether the hand hold was "unreasonably dangerous to the plaintiff." It may be that things which are "not reasonably safe" are not in all cases "unreasonably dangerous," but it cannot be affirmed that anything "unreasonably dangerous" could be "reasonably safe." The finding, therefore, negatived the performance on the part of the master of his duty in this respect and was sufficient. The sixth and seventh questions were properly submitted. The defendant now considers the sixth question superfluous. The sixth question inquired, "was the condition of the hand hold such as to make it apparent to one knowing its condition that it was dangerous to use," and the seventh question inquired whether the plaintiff on the day he was injured and before his injury knew of the dangerous condition of the hand hold. These questions were apparently inserted in the special verdict for the benefit of the defendant; that is, to enable it to call for separate findings on these two items of fact which it might be disadvantageous to the defendant to cover by some more general conclusion of fact. If the seventh question had been answered "Yes" instead of "No," the defendant would not be here found contending that the sixth question was superfluous. There was no error in this respect.

Finally, it is contended that the court erred in granting a new trial conditionally, but should have set aside the verdict unconditionally, for the reason that there has never been any assessment of damages by the jury. In answer to a question of the special verdict the jury fixed the plaintiff's damages at \$20,000, the full amount demanded in the complaint. This is conceded by both parties to be excessive, and the defendant moved to set aside the verdict and for a new trial upon the ground, among others, that the damages awarded by said verdict were excessive. The trial court on this motion filed a written opinion saying: "The right and duty of this court to give the parties the option of having judgment entered for a less amount rather than be compelled to retry the case are no longer in doubt in this state. *Rueping v. C. & N. W. Ry. Co.*, 123 Wis. 319, 101 N. W. 710; *Heimlich v. Tabor*, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669. And it is immaterial what caused the jury to render the excessive verdict. It is sufficient that it is excessive from prejudice or other cause. An excessively large verdict in the absence of any other explana-

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tion may be usually treated as prima facie evidence that the jury was not unprejudiced, fair, and impartial. * * * The court is not authorized to determine what amount of damages the plaintiff shall recover, thus substituting his judgment for that of the jury. But the court is to determine the maximum and minimum amounts that an impartial and unprejudiced jury would probably name, as no two juries fair and impartial and unprejudiced would arrive at the same amount. The question is what would be the smallest amount that any such jury might assess and what the largest amount that any other such jury might honestly assess, and the only way suggested for solving this question is by ascertaining what such juries have done in similar cases and what amounts have been held to be excessively large or small. When these two limits have been arrived at reasonable doubts being resolved in favor of making the minimum small and the maximum large, the court then gives the defendant the option of consenting to judgment against him for the larger amount, and if he does not so elect the option is then given to the plaintiff to take judgment for the smaller amount and in the event of neither option being exercised the verdict is set aside and a new trial awarded." The trial court made an order accordingly fixing the minimum at \$5,000 and the maximum at \$9,000 and giving the option stated. The plaintiff elected to take judgment for \$5,000 rather than have a new trial.

Several members of this court consider the minimum fixed by the trial court too high, and would reverse the judgment on that ground. The majority, however, are unwilling to reverse the judgment if the minimum is to be ascertained as indicated by the trial court, because ascertaining the minimum in that way it is probable that the minimum fixed by the trial court is as nearly correct as can be expected. The majority of this court, however, consider the mode adopted by the trial court of arriving at the minimum a correct one, and approve and adopt that part of the opinion of the court below herein quoted. For these reasons, the judgment of the circuit court must be affirmed. The writer may be permitted to say that in his view if the minimum is to be ascertained as indicated by the trial court the amount fixed by the trial court is as nearly correct as can be expected; but he thinks the minimum should be ascertained upon a consideration of what the trial judge considers the minimum and not by a comparison with what juries have actually done in similar cases. The difficulty with the latter method of arriving at the minimum is that no jury ordinarily awards the minimum amount of damage actually suffered in such case. Small verdicts are the arbitrary result of compromise among the jurors. The verdict in every case represents the actual damage in that case except where there is error, passion or prejudice. This mode of ascertaining the minimum will inevitably destroy the rule itself, because the minimum ascertained in this

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way will be constantly increasing, and what is termed a minimum will be really the actual and ordinary damages which an unprejudiced jury usually ascertains and awards, which is in truth, not the minimum nor the maximum, but a sum between both. So that the rule will finally result, as in the case at bar, in giving the plaintiff an option to take a new trial or take judgment for the actual average amount of his damages as near as such can be ascertained, while the defendant's option will be to submit to a judgment in excess of a fair admeasurement of the plaintiff's damages. If this is a fair construction of the rule laid down in *Rueping v. Ry. Co.*, 123 Wis. 319, 101 N. W. 710, then I think that rule should be modified. But I do not think that is a fair construction of the ruling in that case. What the Supreme Court there appears to have done is to first place its own estimate upon the minimum damages, and then to support that estimate argumentatively by citing instances of verdicts. If there is no invasion by the court of the province of the jury in estimating the actual unliquidated damages of the plaintiff and granting a new trial conditioned upon the plaintiff remitting all excess found by the jury (*Baxter v. C. & N. W. Ry. Co.*, 104 Wis. 307, 337, 80 N. W. 644, and cases referred to), I do not see how it can be said that there is such invasion where the court estimates the minimum amount of such damage which an ideal unprejudiced jury would award to the plaintiff, and makes his grant of a new trial conditional upon the plaintiff's refusal to accept a verdict for that sum.

The judgment of the circuit court is affirmed.

UNITED STATES *v.* ATCHISON, T. & S. F. RY. CO.
(Circuit Court of Appeals, Eighth Circuit, August 22, 1908.)

[163 Fed. Rep. 517.]

Railroads—Safety Appliance Act—Car Couplings—Duty Imposed Is Absolute.—The safety appliance law of Congress, in the situations in which it is applicable, imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end. *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Colorado.

For opinion of the court below, see 150 Fed. 442.

Ralph Hartzell, Asst. U. S. Atty., and *Luther M. Walter*, Special Asst. U. S. Atty. (*Earl M. Cranston*, U. S. Atty., on the brief).

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Henry T. Rodgers (*Pierpont Fuller*, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment for the defendant in a civil action to recover a penalty for an alleged violation of the safety appliance law of Congress embodied in Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Stripped of matters about which there is no controversy here, the violation charged consisted in hauling a car, in the usual course of transportation, when one of the couplers thereon was broken and inoperative, so that it could not be coupled or uncoupled without the necessity of a man going between the ends of the cars. The trial was to a jury, and the single question presented to us is whether or not the duty of the defendant, in respect of the maintenance of the coupler in an operative condition, was correctly stated in the portion of the court's charge, which reads:

"The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. * * * And it is for you to determine in this case whether or not the defendant used reasonable care in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict in favor of the defendant; otherwise, you should find for the United States."

Applying to the evidence the law as so interpreted, the jury returned a verdict for the defendant, which the court declined to disturb upon a motion for a new trial. *United States v. Atchison, etc., Ry. Co.* (D. C.) 150 Fed. 442. That the interpretation of this law of Congress has been attended with difficulty is attested by many varying opinions in the reported case, and that there are considerations tending to sustain the construction placed upon it by the District Court is attested by the opinion rendered upon the motion for a new trial and by the sustaining opinions in other cases, notably *St. Louis & S. F. Ry. Co. v. Delk* (C. C. A.) 158 Fed. 931; but, as we read the opinion of the Supreme Court in the more recent case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. —,

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s. c. 71 Ark. 415, 78 S. W. 220; 83 Ark. 591, 98 S. W. 595, it is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the nonliability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; it being said in that connection (page 294 of 210 U. S., page 620 of 28 Sup. Ct. [52 L. Ed. —]):

“In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry. v. Delk* [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when or how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is prescribed. It is enacted that ‘no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.’ There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.”

While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5, relating to drawbars, is the same as section 2, relating to couplers, and section 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

Because, in view of the later decision in the *Taylor Case*, the instruction before quoted did not embody a correct statement of the law, the judgment is reversed with a direction to grant a new trial.

STATE *v.* CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, Sept. 29, 1908.)

[117 N. W. Rep. 686.]

Commerce—Subjects of Regulation—Relation of Master and Servant.—The regulation of the relation of master and servant, as to acts done in interstate commerce, as to the responsibility of the master for injuries to a servant, and as to limiting the hours of labor, is within the power conferred on Congress by the interstate commerce clause of the federal Constitution.

Same—Power to Regulate—Powers in States.—The power of the state to control the conduct of individuals therein for the safety of the community is not taken away by the commerce clause of the federal Constitution merely because some remote influence on interstate commerce may result; but state legislation which directly and intentionally controls and regulates interstate commerce is prohibited.

Same—Statutes—Validity.*—Laws 1907, p. 1188, c. 575, prohibiting any corporation operating a line of railroad in whole or in part in the state from requiring or permitting any telegraph operator, including train dispatcher, to remain on duty for more than one period of 8 consecutive hours, is within the field of legislation by the states, notwithstanding the interstate commerce clause in the federal Constitution, until Congress exercises its power to regulate the hours of labor of employees engaged in interstate commerce; and under Const. U. S. art. 6, par. 2, declaring that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land, the regulation of Congress on the subject is supreme, and is an assertion of the federal power and a declaration of policy that the subject shall be under federal, and not state, regulation.

Same.—Laws 1907, p. 1188, c. 575, prohibiting any corporation operating a line of railroad in whole or in part in the state from per-

*For the authorities in this series on the subject of state interference with interstate commerce, see foot-note appended to *Halliday Milling Co. v. Louisiana & N. W. R. Co.* (Ark.), 27 R. R. R. 310, 50 Am. & Eng. R. Cas., N. S., 310; foot-note appended to *Charles v. Atlantic Coast Line R. Co.* (S. Car.), 27 R. R. R. 130, 50 Am. & Eng. R. Cas., N. S., 130; foot-notes appended to *Jonesville Mfg. Co. v. Southern Ry.* (S. Car.), 27 R. R. R. 116, 50 Am. & Eng. R. Cas., N. S., 116; first foot-note appended to *Pittsburg, etc., Ry. Co. v. Hartford City* (Ind.), 27 R. R. R. 82, 50 Am. & Eng. R. Cas., N. S., 82; *Venning v. Atlantic Coast Line R. Co.* (S. Car.), 26 R. R. R. 666, 49 Am. & Eng. R. Cas., N. S., 666; *Cincinnati, etc., R. Co. v. Commonwealth* (Ky.), 26 R. R. R. 632, 49 Am. & Eng. R. Cas., N. S., 632; foot-note appended to *State v. Cumberland & P. P. Co.* (Md.), 25 R. R. R. 122, 48 Am. & Eng. R. Cas., N. S., 122; foot-note appended to *Atlantic C. L. Ry. Co. v. Commonwealth* (Va.), 11 R. R. R. 399, 34 Am. & Eng. R. Cas., N. S., 399, where all those preceding it are collected.

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mitting any telegraph operator, including train dispatcher, to remain on duty for more than one period of 8 consecutive hours, etc., is in conflict with and in negation of Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1907, p. 913), regulating the hours of labor of employees engaged in interstate commerce, and providing that no operator or train dispatcher shall be permitted to remain on duty for a longer period than 9 hours in any 24-hour period in places continuously operated night and day, nor for a period longer than 13 hours in places operated only during the daytime, with exceptions in case of emergencies, etc., and the state statute cannot be enforced as to such employees; the act of Congress being a declaration by it of a will and policy that, so far as the regulation and safeguarding of interstate commerce may be affected by prescribing hours of labor for such employees, the subject shall be under control of Congress, and not of the states.

Same.—The right of the state in the exercise of its police power to protect its citizens from perils resulting from excessive hours of labor by railroad employees is in no way impaired by the federal Constitution, except as such legislation shall restrain interstate commerce in a respect in which Congress has deemed wise to regulate it.

Statutes—Partial Invalidity—Effect.—Laws 1907, p. 1188, c. 575, prohibiting any corporation operating a line of railroad in whole or in part in the state from requiring any operator, including train dispatcher, to remain on duty for more than one period of 8 consecutive hours, etc., undertakes in terms to restrict the hours of work of employees engaged in conducting interstate commerce, as well as domestic commerce, and the court cannot uphold the act so far as it relates to domestic commerce, while adjudging it invalid when applied to interstate commerce; such a decision not being warranted by the language of the act, and it being impracticable to limit hours of work devoted to domestic commerce alone.

Commerce—Power to Regulate—Statutes—Validity.—Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1907, p. 913), making it unlawful for any common carrier subject to the act to permit any employee subject to the act to remain on duty for a period longer than a specified time, etc., is confined in its application to the relation of employer and employee while engaged in interstate commerce, and is valid.

Appeal from Circuit Court, Milwaukee County; Warren D. Tarrant, Judge.

Action by the state against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Action for penalty under chapter 575, p. 1188, of the Laws of 1907, for that on the 11th day of January, 1908, one McGrath was a telegraph operator in defendant's station at Milwaukee

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engaged in reporting and receiving orders affecting the movement of cars, engines, and trains of the defendant company, and operating signal devices; that on said day the defendant required, allowed, and permitted said McGrath to be and remain on duty for said defendant 12 consecutive hours, not by reason of any casualty upon said railroad. The answer set up numerous separate defenses, most of them attacking the validity of the state law as inimical either to the fourteenth amendment of the United States Constitution or to certain provisions of our own Constitution, and some of them asserting certain technical grounds of escape from the words of the act. By the second and fifth defenses it was set forth that the defendant's road ran through several states; that it was engaged in both interstate and intrastate business by the same employees, trains, cars, appliances, and track; that it was unavoidable that the same operator should work upon all trains passing over the same division of the road, both those whose termini were wholly within the state and those which crossed the state line; that it was wholly impossible that either class of trains should be directed or governed by a separate man; that during the excess time of employment of McGrath there was one train as to which he made reports, received orders, etc., which ran wholly within the state and carried nothing of interstate commerce, but that the great majority of trains in any way acted upon by him were interstate commerce trains; that any attempt to separate interstate from domestic commerce in the operation of trains and the regulation thereof by said operatives would result in great danger, delay, interference, and expense to the interstate commerce; that the statute in question was therefore void as restricting and regulating interstate commerce, in defiance of the Constitution of the United States, conferring upon Congress the power to regulate such commerce, and also Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1907, p. 913), which prescribed a different and longer service for the same employees. The separate defenses of the answer were each met by a separate demurrer, except the first, which merely denied indebtedness for the penalty. The court below sustained the demurrer to all of said defenses, except the first. The defendant declining to amend, judgment was entered for the plaintiff for the sum of \$1,000, with costs, from which the defendant appeals.

C. H. Van Alstine, H. J. Killilea, and Burton Hanson, for appellant.

F. L. Gilbert, Atty. Gen., A. C. Titus, Asst. Atty. Gen., F. E. McGovern, Dist. Atty., and N. L. Baker, Asst. Dist. Atty., for the State.

DODGE, J. (after stating the facts above). The primary and most earnestly argued question is whether the act (Laws 1907, p. 1188, c. 575, § 1816m) prohibiting a corporation,

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operating a line of railroad in whole or in part in this state, to require or permit any (telegraph or telephone) operator (including train dispatcher) to remain on duty for more than one period of eight consecutive hours, so regulates interstate commerce intentionally or by necessary effect that it invades the power conferred upon Congress by article 1, § 8, Const. U. S., "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," that it cannot stand. That the regulation of the relation between master and servant as to acts done in interstate commerce is within the power thus conferred upon Congress is authoritatively decided by the Employer's Liability Cases, 207 U. S. 463, 494, 28 Sup. Ct. 141, 52 L. Ed. 297. It is categorically so declared in the opinion of the court, although three of the five justices who concurred in the decision withheld their assent from this proposition, which, however, received the approval of the three justices who dissented from the ultimate decision. We can discover no distinction in principle between the subject of regulation considered in that case, namely, the responsibility of the employer for injuries to an employee, though due to the negligence of a fellow servant, and the subject of the act under consideration, which is the prohibition of employers from imposing upon employees excessive hours of labor. Both must seek their justification for governmental action in the same principles and reasons, either in the protection of a class of employees from requirements hurtful to them, or in the protection of the welfare and safety of the public and of the commerce from dangers supposed to arise by reason of burdensome responsibilities or perils imposed upon the employees of railroads. While the thing primarily regulated is not commerce, the regulation of the conduct of the individual while engaged in carrying on that commerce so directly affects it that the latter is thereby regulated.

But the mere fact that in some degree interstate commerce is affected by the act of a state Legislature is not universally sufficient to condemn that act. The power of the state to control the conduct of individuals therein for the safety of the community is not taken away by the provision of the federal Constitution above mentioned merely because some fanciful or remote influence upon interstate commerce may result. Property may be taxed upon its value, although that value in part depends upon a franchise, or ability to use it, in interstate commerce, even though it may appear that the increased burden of taxation upon it must be paid out of the earnings of interstate commerce, and that, therefore, the charges upon such commerce will probably be increased. Dishonest practices by peddlers may be forbidden and punished by a state, notwithstanding they are practices by which some peddlers effect sales in the course of interstate commerce. *Henderson B. Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953. On the other hand,

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state legislation is prohibited which directly and intentionally controls and regulates interstate commerce, as, for example, an act which in terms regulates freight or passenger charges for interstate carriage, or which imposes a direct prohibition or charge upon the importation of property from one state into another. *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700; *Covington B. Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962. Between these two extremes, however, lies a broad field for legislation claimed to be justified by necessary protection of the safety of the local community, which more or less directly obstructs, restrains, and regulates the transaction of interstate commerce—legislation not enacted for that purpose, but incidentally having the result. The Supreme Court of the United States, in *Covington B. Co. v. Kentucky*, *supra*, has classified that field into three classes of legislative acts: The first, where the states have plenary power and Congress has no right to interfere, which concern the strictly internal commerce of the state, and, while the regulation may affect interstate commerce indirectly, its bearing is so remote that it cannot be termed in any just sense interference. The second includes cases of what may be termed “concurrent jurisdiction,” where the states may act in the absence of congressional action. Obviously this field must be one where Congress has right and power, to act if it sees fit, but where some restraint and regulation is necessary, and the authority therefor is deemed to be conceded to the states pending nonaction of Congress. The third is the class where, from the very intimacy with and directness of effect upon interstate commerce of any legislative action, and national scope of the subject of legislation, it is presumed that the refraining of Congress from promulgating any regulations must be considered to declare a policy that the subject shall be free from regulation.

Pretty obviously, under the decisions of the Supreme Court of the United States, the act we are considering must fall in the second class. The safety of the public may be so imperiled by the employment of incompetent or disabled persons in and about railroads, navigation, and the like that the necessity for some legislation in regard thereto is manifest, and the forbearance of Congress to legislate might well be deemed significant of its policy to leave the subject of regulation to the Legislatures of the several states. In this line it has been held that examination of pilots or railroad engineers with reference to physical capacity, especially color blindness, as a condition of their employment, is competent for a state. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Nashville, etc., Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352. As pointed out in the latter case (page 101 of 128 U. S., page 29, of 9 Sup. Ct. [32 L. Ed. 352]): “Such legislation is not directed against commerce. It

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only affects it incidentally." In the former case it is suggested that acts much more intimately connected with the commerce itself would be competent, such as those requiring safeguards and signals in running trains, provision for the safety of passengers, regulating the manner of heating cars (*New York, etc., Ry. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853), regulating the speed of trains (*Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897), requiring the stopping of trains at certain stations (*Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064), and others of like import. From these we cannot doubt that prohibition of an overfatigued telegraph operator from directing the operation of trains falls within the state's power to control, even though thereby the conduct of interstate commerce might be impeded or burdened. But this power in the states is subject to that provision in the Constitution that Congress shall have power to regulate interstate commerce; that is, to prescribe the restrictions and limitations under which it shall be conducted, and when it prescribes those regulations it does so to the exclusion of state legislation accomplishing a like regulation directly or indirectly, and whether intended for that purpose or not. That is declared in all of the cases above cited, conceding to the states authority over such subjects in the absence of congressional legislation.

Within the field of authorized congressional action the federal power must, in the nature of things, be supreme in all parts of the United States. "This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Article 6, par. 2, Const. U. S. In *Cooley v. Board of Wardens*, 12 How. 299, 318, 13 L. Ed. 996, it was said of this class of legislation: "It is not the mere existence of such power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional legislation." In *State of Pennsylvania v. Wheeling, etc., Co.*, 18 How. 481, 15 L. Ed. 435, where a state law authorized the building of a bridge over a navigable water, it was declared that even in the matter of a bridge, "if Congress chooses to act, its action necessarily precludes the action of the state." In *United States v. Colorado & N. W. R. Co.* (C. C. A.) 157 Fed. 321, 330, Sanborn, J., remarks: "The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and, if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually. * * * That power is not subordinate, but it is para-

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mount, to all the powers of the states. If its independent and lawful exercise of this congressional power and the attempted exercise by a state of any of its powers impinge or conflict, the former must prevail and the latter must give way." See, also, *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210, 6 L. Ed. 23. It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a state will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the subject; the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the states of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power, a declaration of the policy that the subject shall be under federal and not state regulation, and that, therefore, the power shall no longer rest in the state to exercise that authority which by the Constitution of the United States was surrendered to the federal government when and if Congress deemed its exercise advisable.

On March 4, 1907, before the act now under consideration was passed, and even before it was introduced in the Wisconsin Legislature, Congress had legislated fully upon the subject of hours of labor for the very class of employees affected by section 1816m. It then provided (Act March 4, 1907, p. 1415, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1907, p. 913]), that it should be unlawful for any common carrier subject to the act to require or permit any employee subject to the act to be or remain on duty for a period longer than 16 consecutive hours, and that no operator or train dispatcher should be required or permitted to remain on duty for a longer period than 9 hours in any 24-hour period in places continuously operated night and day, nor for a period longer than 13 hours in places operated only during the daytime, with exceptions in case of emergencies. This was a clear declaration by Congress of a will and policy that, so far as the regulation and safeguarding of interstate commerce might properly be affected by prescribing hours of labor for such employees, the subject should be under control of Congress, and not of the state Legislatures. Doubtless the state Legislatures persisted in their power to protect the safety of their respective communities by reasonably regulating the hours of service of railroad employees, with the limitation, however, that they must not thereby restrict or effectively regulate interstate commerce. Under many of the decisions above cited the state was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from state competency. *State v. Mo., etc., Ry. (Mo.)* 111 S. W. 500.

Apart from this view, however, it is too obvious to need more than statement that the legislation fixing 9 and 13 hours, re-

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spectively, as the permitted term of employment, was declaration of a federal policy on that subject, and that a state law excluding interstate railways from the use of their employees on interstate commerce for 1 of the 9 hours or for 5 of the 13 hours would be in direct conflict with that policy. The absence of such an employee at a small station upon an interstate road might well be a most serious inconvenience and burden upon both the celerity and safety of interstate commerce past that station, and requirement of such absence would be in direct antagonism to the policy of the federal law permitting presence and employment. Not less obviously the act of Congress declared a policy that interstate railroads should have a reasonable time in which to adjust their business to the new restrictions, by postponing the date when the law should become operative for one year after its passage, thus indicating that such period of time was so necessary to reasonable convenience of interstate commerce. Indeed, this latter implication is not only clear from the act, but made the more certain by reference to the debates and reports of committees attending the consideration and passage of the law of Congress. Hence a state provision to the effect that the time for such preparation and adjustment should be restricted to the 1st of January, 1908, as contained in chapter 575, p. 1188, Laws of 1907, is in direct conflict with the policy of Congress. *State v. Mo., etc., Ry., supra.* We are therefore constrained to the conclusion that restriction of hours of labor of telegraph operators engaged in moving interstate trains or traffic is a field of legislation forbidden to the states by the federal Constitution, but also that the limitation contained in our statute is in conflict with and in negation of the act of Congress, and cannot be enforced as to such employees.

It may not be out of place to reiterate, what has already been said, that the right of the state, in the sincere exercise of its police power, to protect its citizens generally from any perils resulting from excessive hours of labor by railroad employees, is in no way impaired by the federal Constitution, except as such legislation shall interfere with or restrain interstate commerce in a respect in which Congress has deemed wise to regulate it. The conduct of persons within the state inimical to public safety is within the police control of the state, whether those persons be engaged in interstate commerce or not, so long as restrictions upon their conduct will not affect the interstate commerce. *M., K. & T. Ry. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878; *Ried v. Colorado*, 187 U. S. 147, 148, 23 Sup. Ct. 92, 47 L. Ed. 108; *Gibbons v. Ogden*, 9 Wheat. 1, 104, 6 L. Ed. 23; *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed.—.

The further contention is made by the respondent that, even if it be beyond the power of the state to restrict the services of an operator engaged in moving interstate trains, it is competent to so restrict as to one engaged exclusively upon trains or business

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wholly within the state, and that the law may be construed as so limited, and its validity as so limited be sustained. The principle invoked is doubtless sound, if it is reasonably possible to separate the permissible from the forbidden, and to believe that the Legislature intended by the act to effect the one and omit the other. On this subject the Employer's Liability Cases, *supra*, are entirely germane and controlling. It is there pointed out that by its terms the act is aimed simply at the employer, and makes no distinction in denunciation of his acts, whether they be done in interstate or intrastate business, so that it in terms regulates purely domestic acts and transactions. Chapter 575, p. 1188, Laws of 1907, is even more objectionable in this regard than the employer's liability act; for it in terms is directed to every corporation operating a line of railroad, in whole or in part, in the state of Wisconsin, thus expressly including those who are engaged in interstate commerce. But it is also open to the other objection, held to be fatal, that it restricts the employment of all operators, without discrimination as to the character of their services. This alone, under the reasoning of the employer's liability act, *supra*, must condemn the state act; for it is matter of common knowledge, and is set up as a fact by the answer, that any operator who works upon trains or transportation wholly within the state also necessarily and at the same time works upon interstate trains and transportation. State v. Mo., etc., Ry. *supra*. The state Legislature has in terms undertaken to restrict hours of work of employees engaged in safeguarding and conducting interstate commerce, as well as domestic; and, controlled as we must be by the decision of the federal Supreme Court, we cannot import a meaning contradictory to the express words. Neither can we feel any certainty that the generality of the restriction was not an essential element in the entire legislative scheme, so that we might believe the Legislature would have imposed upon domestic commerce, or on employees exclusively engaged therein, burdens not also resting on entirely similar acts of employees involving interstate trains or commerce.

Apart, however, from the controlling effect of the reasons urged in the Employer's Liability Cases, and in addition thereto, we think the impracticability, if not impossibility, of limiting hours of work devoted to domestic commerce alone, is so obvious as to preclude belief in any such legislative purpose. That impracticability is largely shown by facts alleged in the answer, but also by facts which are matter of common knowledge. The direction and dispatching of every train on an interstate railway necessarily involves knowledge in the train dispatcher of all other trains which are in the same vicinity at the same time, and also ability to control such other trains. An interstate train from Milwaukee to Chicago cannot be safely forwarded, if under the direction of a separate employee a local train may be moving between Mil-

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waukee and Racine over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously diversion of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train dispatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He cannot move or stop the most distinctively local train without affecting the interstate train, or vice versa. No extra or special can be put on the division without adjustment of other trains. Of course, also, every interstate train carries some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involved so much of confusion and probability of danger, and its possibility even is so doubtful and experimental, that no Legislature would absolutely precipitate it without careful consideration, nor without providing in the act for the event of the failure of such experiments. For this reason as well we are convinced that the legislative purpose involved what the legislative words include, the regulation of services of all operators, and would in no wise be satisfied, even in part, by a restriction to those whose acts affect only domestic commerce, if, indeed, there are any such.

But it is claimed that the federal act of March 4, 1907, itself is unconstitutional upon the same ground that the employer's liability act was so held in the case already mentioned, reported at 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. That case, from amongst great contrariety of opinion of individual justices, finally decided the very narrow proposition that the mere fact that a person or corporation is engaged in interstate commerce does not confer upon Congress authority to regulate its acts not connected with such commerce. The court took judicial notice of the fact that nearly all railroad companies engaged in interstate commerce are also engaged in business which is purely domestic to some individual state, as, for instance, in transportation wholly within the state, but also in the maintenance of factories and repair shops and other operations in no wise affecting interstate commerce. That law was addressed to every common carrier engaged in interstate commerce, and regulated every such common carrier in its relations with each and every of its employees, wholly without regard to the kind of service rendered by such employees. It was held that by its terms it sought to regulate that relation with employees not engaged in interstate commerce—a boilermaker in its engine shops, a carpenter repairing its warehouses, or a sweeper in the barns of an express company—and that, therefore, it was not within any power conferred upon

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Congress, notably not within that to regulate interstate commerce. The act of Congress of March 4, 1907, was passed after that case had been decided in the same way in the lower court, and after a writ of error had been for some time pending in the Supreme Court, and the department of justice had asked, and been granted, right to be heard on behalf of the United States on the question of constitutionality. The contention of those who attacked the employer's liability law was doubtless well known to the Interstate Commerce Commission and to the Congress. It is therefore entirely natural and probable that an attempt would have been made to differentiate the latter enactment from the former one, and to escape the somewhat technical ground of invalidity in the former. It is without surprise, therefore, that we find such differentiating provision in the first section, to the effect "that the provisions of this act shall apply to any common carrier or carriers, their officers, agents and employees, engaged in the transportation of passengers," etc., between the several states, and also: "The term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any [interstate] train." It will also be noted that the hours of employment are prescribed for "any employee subject to this act." We cannot doubt that by these phrases the operation of the present act was limited, not only to employers engaged in interstate commerce, but to the conduct of employees so engaged, to the exclusion of any who might be engaged purely in the domestic affairs of the employer, and that by this very distinction and limitation of the application of the act the legislation is brought within that portion of the decision which holds that the employer's liability act would have been valid had it been confined in application to the relation of employees while engaged in interstate commerce. 207 U. S. at page 496, 28 Sup. Ct. 141, 52 L. Ed. 297.

Since our conclusion is fatal to chapter 575, p. 1188, Laws of 1907, no possible necessity for or benefit from a new trial can result. Hence:

Judgment reversed, and cause remanded, with directions to enter judgment for the defendant.

MISSOURI, K. & O. R. Co. *v.* FERGUSON.

(Supreme Court of Oklahoma, May 15, 1908.)

[96 Pac. Rep. 755.]

Master and Servant—Negligence of Independent Contractor—Liability of Master.*—A railroad company may let to an independent contractor the contract to do such work as is not in itself necessarily or intrinsically dangerous to person or property, without incurring any liability for the negligence of the contractor's employees.

Same—Evidence.—In a suit against a railroad company for negligently injuring an animal, where the proof shows it to have been injured by becoming entangled in a wire fence in the course of construction along defendant's right of way, it was error for the court to exclude evidence, offered on behalf of defendant, showing that the fence at the time was being constructed by an independent contractor.

(Syllabus by the Court.)

Error from District Court, Logan County; John H. Burford, Judge.

Action by Joel Ferguson against the Missouri, Kansas & Oklahoma Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed and remanded.

On April 30, 1904, Joel Ferguson, defendant in error, plaintiff below, sued the Missouri, Kansas & Oklahoma Railroad Company, plaintiff in error, defendant below, hereafter called plaintiff and defendant, before a justice of the peace in Logan county; Okl. T., in damages for injury to an animal in the sum of \$75, which was appealed to the district court of Logan county, and on trial anew in that court judgment was rendered in favor of the plaintiff, from which defendant has appealed to this court.

The complaint, in substance, alleges that defendant, Missouri, Kansas & Oklahoma Railroad Company, a corporation, was engaged in the business of owning, operating, and constructing a railway in said county and territory, and, while on February 27, 1904, by its employees and agents constructing a wire fence along its right of way across a farm, which plaintiff was occupying as tenant, carelessly and loosely stretched four strands of barbed wire the full distance across said farm, and securely fastened them with staples at both ends, leaving said strands lying on the ground in an exceedingly dangerous and hazardous position; that said line of fence, when completed, would form a part of an in-

*See extensive note, 24 R. R. R. 317, 47 Am. & Eng. R. Cas., N. S., 317; foot-note appended to St. Louis, etc., R. Co. *v.* Madden (Kan.), 27 R. R. R. 48, 50 Am. & Eng. R. Cas., N. S., 48.

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closure belonging to plaintiff, where he had a large number of cattle and horses running at large, which fact defendant well knew; that by reason of said negligent construction of the fence on the part of the defendant a certain mare owned by plaintiff became intangled in said wire, seriously cutting and wounding it to its permanent injury, and to the damage of plaintiff in the sum of \$75, for which he prays judgment, together with the sum of \$20 for the loss of its services and \$4 for medicines supplied by him in taking care of and treating the animal, in all the sum of \$99.50. For answer defendant pleads a general denial, and states, in substance, that the alleged injury was occasioned, if at all, by the act of servants, agents, or employees of an independent contractor or subcontractor, and not by the act of any agent, servant, or employee of defendant; that the name of the contractor with whom said defendant made a contract for the erection of fences along its right of way was N. G. Vandeventer, and that a copy of said contract would be produced on the trial. There was a trial to a jury, and after plaintiff had introduced evidence fairly tending to establish the allegations in his petition, defendant offered to prove that the negligence complained of was that of an independent contractor, as set forth in its answer, and offered in evidence its contract with N. G. Vandeventer, as such, wherein he agreed to furnish the men and material and construct, for an agreed price, some 250 miles of wire fence along defendant's right of way, of which the fence in question was a part, dated April 28, 1902. This was objected to by counsel, and excluded by the court, and exceptions saved. There was a verdict and judgment for plaintiff, from which defendant appealed.

John E. Dumars, S. A. Calhoun, A. H. Huston, and C. G. Honor, for plaintiff in error.

Dale & Bierer, for defendant in error.

TURNER, J. (after stating the facts as above). Among the several assignments of error the only one necessary for us to consider is whether the court erred in excluding the testimony offered by defendant, to the effect that the negligence complained of was of an independent contractor. If defendant was not chargeable with the negligence of its independent contractor under the circumstances, then the testimony should have been admitted, otherwise not. In other words, does the doctrine of respondeat superior apply in this case? If it does, the testimony was properly excluded. If it does not, it was error to exclude it. It is contended by defendant that it does not apply; that the testimony was admissible for the reason that, as the act of fencing its right of way was not unlawful or intrinsically dangerous and that the injury complained of did not result necessarily from the work, defendant was strictly within its rights to let its construc-

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tion to an independent contractor, for whose negligence in the prosecution of the work it was not liable. This leads us to inquire as to the nature and character of the work that can be let so as to leave the liability of its negligent prosecution on the contractor.

The well-established rule is that: "Where a person, exercising an independent employment, enters into a contract with another as an independent contractor, and not as a mere servant of the latter for the bestowal of his personal services according to the will of the latter, the doctrine of respondeat superior does not apply, and the contractor is alone liable for injuries arising from the negligence of himself or his servants, unless (1) the act to be done is unlawful; or (2) is intrinsically dangerous, or the injury resulted necessarily from the nature of the work, and not from the lack of care or skill on the part of those executing it; or (3) unless there be a personal and immediate duty, on the part of the contractee, to prevent, or use due care to prevent, the act or condition from which the injury arose." 1 Thomas on Negligence, p. 631. Again, 16 Am. & Eng. Enc. of Law (page 201) says: "If the work contracted for is of such a character that it is intrinsically dangerous, or will probably result in injury to a third person, one contracting to have it done is liable for such injuries, though the injury may be avoided if the contractor take proper precautions; a distinction being made between such a case and one in which the work contracted for is such that, if properly done, no injurious consequences can arise"—and cases cited. This is undoubtedly the rule supported by the weight of authority.

In *Callahan v. Burlington & Missouri River R. R. Co.*, 23 Iowa, 562, there was a demurrer to the petition, which the court sustained. On appeal, affirming the case, the Supreme Court said: "The petition does not allege that the burning of the wood, brush, etc., was in itself an act necessarily dangerous to the property of appellant, but avers that the damage resulted because the act was carelessly and negligently done. The appellant did not sustain the loss on account of the act itself, but on account of the careless and negligent manner in which it was done. Appellee directed that the act should be done, and it was lawful and innocent in itself. The contractors only had control of those who did the act, and could alone direct the manner of its performance. The loss resulted from the manner of the act done. It is clear that appellee is not liable therefor."

Wabash, etc., Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696, was an action to recover damages for an injury to a traveler on a highway through the freight of his horse, caused by the negligence of the owner of a portable steam engine in operating in or near the highway, on a contract with the company to pump water out of an excavation which was being constructed by the latter, where he had exclusive control of the engine and the

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manner of using it. The court said: "The question is whether, under the circumstances, the railway company is liable for the negligence of Williams, assuming that he was negligent in operating his engine so near the public highway. The rule which controls in cases of this class has become well established, and has more than once been recognized and applied by this court. *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123; *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *City of Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166. Under this rule, where work which does not necessarily create a nuisance, but is, in itself, harmless and lawful when carefully conducted, is let by an employer, who merely prescribes the end, to another, who undertakes to accomplish the end prescribed by means which he is to employ at his discretion, the latter is, in respect to the names employed, the master. If during the progress of the work a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not answerable." In *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437, the court said: "The cause of the accident therefore, was not in the manner in which the work was carried on by the laborers. If it had been, their immediate employer, and he only, was liable for the injury. But in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed."

Negus v. Becker, 143 N. Y. 303, 38 N. E. 290, 25 L. R. A. 667, 42 Am. St. Rep. 724, was a case in which the injury occurred from the falling of a wall, built by an independent contractor. The suit was against the parties employing the contractor. In holding that they were not liable the court said: "They were within the exercise of their legal right in what they did, and it is impossible to say that they assumed any risk in building a wall of the height originally contemplated, so long as they contracted for one of suitable strength, and so adapted as to serve, when built, the purposes of the defendant's new building. * * * If there was a negligence in the construction of the wall, and its fall could be attributed to some negligent act of commission or omission in the process of construction, it is very clear that the party liable for the resulting damage would be the contractor."

Hence, as it does not appear that there was anything unlawful or intrinsically dangerous in the work of fencing defendant's right of way, or that the undertaking was such that an injury would necessarily result therefrom, we are clearly of the opinion that, in employing an independent contractor to discharge that duty, defendant was acting within its rights under the law, and was not liable for the negligence of such contractor, or the resulting damage to plaintiff, and that the evidence was improperly excluded, unless plaintiff's contention is true, and that is, in substance, that as section 1, art. 3, c. 9, Session Laws 1903, p. 139, c. 9, required defendant to fence its right of way, it cannot escape

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liability by employing a contractor for that purpose. In support of this contention plaintiff cites *C., O. & W. Ry. Co. v. Wilker*, 16 Okl. 384, 84 Pac. 1086, 3 L. R. A. (N. S.) 595, but we do not think the case in point. In that case plaintiff was injured while attempting to cross the railroad on a defective highway after dark, and for that reason could not see its dangerous condition. The court held that the duty of maintaining the highway in a safe condition was imposed by law on the railroad company, which duty could not be delegated; that if the highway was not so maintained, the railroad company was liable. As the injury in the case at bar did not result from a failure of the railroad company to build and maintain a fence, the case cited is not in point. Had the injury resulted in this case from a failure of the railroad company to maintain a fence, the court would probably hold, as it did in the *Wilker Case*, that the railroad company was liable. We have examined all the other authorities cited in support of this contention, and find that they likewise are not in point.

This, substantially, was plaintiff's contention in *Sandford v. Pawtucket Street Ry. Co.*, 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564. In that case the street railway company employed a contractor to construct its railway through the street. The court said: "But he contends to this well-recognized rule there is one equally recognized exception, and that is that no one can escape from the burden of an obligation imposed upon him by law by the engaging for its performance a contractor. In view of this contention, it becomes necessary to ascertain precisely what obligation was imposed by law upon the defendant corporation regarding the construction of its road. Under the provisions of paragraph 3 of its charter the duties devolved upon the corporation are these, viz: That it must put the streets and highways in which it shall lay any rails in as good condition as they were, and keep in repair such portions of the streets as shall be occupied by its tracks; and it makes it liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect, or misconduct of its agents and servants in the management, construction, or use of side tracks or streets. Of course the defendant cannot discharge itself from its statutory obligations by engaging, for their performance, another—that is to say, it is bound, at its peril, to put the streets in which it shall lay rails in as good condition as they were before, and to keep in repair such portions of the streets as shall be occupied by its tracks—and hence, if it should contract with a third person to do this work, and this third person should fail to do it, the defendant would doubtless be liable. *Hole v. Sittingborne & S. R. Co.*, 30 L. J. Exch. 81, 6 Hurlst. & N. 488. But such is not the case before us. Here the case shows, not that defendant had failed to perform its said statutory duty, but that an independent contractor, in constructing the road—a thing which the defendant had the right to do itself.

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* * * The defendant made no agreement with the contractor as to the particular manner in which the road should be constructed or the trolley wire erected; that is to say, the defendant did not authorize the contractor to place, stretch, or maintain a wire or rope across the street in the manner complained of. He was simply authorized to construct the road, thus leaving the manner of doing the same to his skill and judgment. Moreover, the work authorized to be done was not, in itself, a nuisance, nor was it necessarily dangerous or injurious. It was authorized by law. The manner in which it was done was the sole cause of the injury complained of. Hence the obstruction or defect created in the street was purely collateral to the work contracted to be done, and was entirely the result of the wrongful or careless acts of the contractor or his workmen; and in such case it is well settled that the employer is not liable. *Robbins v. Chicago*, 71 U. S. (4 Wall.) 657, 18 L. Ed. 432."

Substantially this contention was also raised in *Railway v. Yonley*, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604. In that case the appellee brought suit against the appellant, and recovered damages, sustained by reason of the burning of a bridge which belonged to appellee, and was situate near the appellant's right of way. The complaint, in substance, alleged that the appellant, through its employees, caused the timber, grass, and stubble along its right of way and near the bridge to be set on fire, everything at the time being very dry and in a very combustible condition, and so negligently fired and managed the same after the fire was started that fire was communicated thereby to the bridge, which was totally destroyed. The act was done by an independent contractor of appellant. It was contended, however, that appellant was liable "(1) because the law imposes upon a railway company the duty to keep its right of way and track free of such matter as is liable to be ignited by sparks or cinders from its engines; and that it cannot delegate to another the performance of that duty; (2) because the setting out of fire necessarily endangered the property of plaintiff, the company having caused it to be set out by an independent contractor or by its agents." The court said: "If the injury complained of had arisen from the escape of sparks from a passing engine, and the negligence charged had been in permitting inflammable matter to remain on the track or right of way, and if the defendant had sought to escape liability for the injury by showing that it had made a contract to have the matter cleared off, and that its presence was due to the negligence of the contractor, then the first position taken by counsel would be strong, and receive support from the authorities they cite. But the injury is charged to have risen, not because of the failure to keep the right of way clear, but by reason of the clearing of it in a negligent, careless and reckless manner. * * * In order that it may discharge its duty, it is authorized to employ means to

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that end. If individual proprietors could employ independent contractors to burn inflammable matter on their premises, without liability under the rule respondeat superior for injury resulting therefrom, a railway company under similar circumstances would enjoy the same immunity. * * * If one employs another to perform a work which, from its nature, is necessarily dangerous to the property of a third person, the employer cannot escape liability for the injury thereby done. In such cases the injury flows from the doing of the act as its natural consequences, and not from the manner in which the act is done. *Mechem on Agency*, § 747; *Cooley, Torts*, p. 646; *Bower v. Peate*, 16 Moak, 374; *Eaton v. European, etc., Ry. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Bailey v. Troy, etc., R. R.*, 57 Vt. 252, 52 Am. Rep. 129; *A. T. & S. F. Ry. v. Dennis*, 38 Kan. 424, 17 Pac. 153; *Callahan v. Burlington, etc., Ry. Co.*, 23 Iowa, 562"—and reversed the case.

Hence we conclude that, as the work contracted to be performed was in itself lawful, and from its nature not necessarily or intrinsically dangerous to person or property, and not a duty, imposed by law on the defendant, such as could not be delegated to an independent contractor, we are constrained to hold that it had a right to do so, and, having done so, was not chargeable with the negligence of the independent contractor complained of, and that the court erred in excluding the testimony. The case is reversed, and remanded for a new trial. All the Justices concur.

WHALEN et al. v. BALTIMORE & O. R. Co.

(Court of Appeals of Maryland, April 1, 1908.)

[69 Atl. Rep. 390.]

Railroads—Location of Sidings—Contracts—Validity.*—A contract binding a railroad company to construct and maintain a siding at a designated place connected with its main line running through a farm, and to stop trains for passengers going to and from the farm, and to leave at the siding cars laden with freight for the owner, is valid and enforceable.

Same.*—There is a manifest distinction between covenants to establish and maintain railway stations for the public convenience and those to establish and maintain sidings for private use merely, and

*For the authorities in this series on the subject of the validity of contracts to build, maintain, and operate, spur tracks or sidings, see foot-note appended to *Reeser v. Philadelphia & R. Ry. Co.* (Pa.), 21 R. R. R. 333, 44 Am. & Eng. R. Cas., N. S., 333; foot-notes appended to *Rodefer v. Pittsburg, etc., R. Co.* (Ohio), 15 R. R. R. 815, 38 Am. & Eng. R. Cas., N. S., 815, where all those preceding it are collected; *Taylor v. Florida E. C. Ry. Co.* (Fla.), 27 R. R. R. 289, 50 Am. & Eng. R. Cas., N. S., 289.

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the former are generally condemned as against public policy, while the latter are to be governed by the circumstances of each case.

Covenants—Covenants Running with the Land.—A covenant to run with the land must extend to the land, so that the thing required to be done will effect the quality, value, or mode of enjoying the estate conveyed, and constitute a condition annexed or appurtenant to it, and there must be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it; and a covenant which does not touch and concern the land is a personal covenant, and binds only the covenantor.

Same.—An owner of a farm conveyed land to a railroad company, and it covenanted to maintain a siding at the farm, to stop its trains for passengers going to and from the farm, and to leave at the siding cars loaded with freight for the owner. The agreement was expressly made, not only with the owner, but also with his heirs and assigns. Held, that the covenant to maintain a turn-out and to stop trains for passengers was a covenant running with the land, while the covenant to leave at the siding cars loaded with freight was a personal one.

Railroads—Location of Roadbed—Right to Change.—A railroad company may, for the purpose of carrying out the object of its creation, change the location of its main line, and the officers thereof are the sole judges of what is proper or convenient.

Same—"Highway."—A railroad is in many essential respects a public highway, and the rules of law applicable to one are generally applicable to the other.

Pleading—Demurrer—Allegations Admitted.—The allegation in a bill to restrain a railroad company from refusing to maintain a siding at a designated place, and stop its trains for passengers and for freight, that the covenant binding it to maintain the siding is not impossible of performance or unreasonable, is not admitted by a demurrer to the bill, which admits only the truth of the facts alleged therein so far as they are relevant and well pleaded, and the question of reasonableness is for the court.

Injunction—Discretion of Court.—Where an injunction, if granted, would accomplish all that a decree for specific performance could effect, the principles governing a bill for specific performance control.

Specific Performance—Discretion of Court.—Specific performance is not a matter of absolute right, but of sound discretion in the court, and it will not be granted when performance has become impossible or the decree would be inequitable, but the party will be left to his remedy at law.

Same.†—A railroad company covenanted to construct and maintain a siding at a designated place, and to stop its trains there for passen-

†See foot-notes appended to *Taylor v. Florida E. C. Ry. Co.* (Fla.), 27 R. R. R. 289, 50 Am. & Eng. R. Cas., N. S., 289.

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gers and freight. The company, for the purpose of straightening its main line and bettering its roadbed and service, changed the location of its main line, and thereby left the siding a quarter of a mile from the main line. It was impossible to construct a siding on the new line. Held, that equity would not compel the company to maintain a train service over the abandoned line past the siding, and relief must be sought in a court of law for damages.

Appeal from Circuit Court, Howard County, in Equity; John G. Rogers and Wm. H. Thomas, Judges.

Suit by Priscilla J. Whalen and another against the Baltimore & Ohio Railroad Company. From an order sustaining a demurrer to the bill, complainants appeal. Affirmed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, PAGE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Edward Hammond and Bernard Carter, for appellants.

F. Neal Parke and James A. C. Bond, for appellee.

WORTHINGTON, J. The appeal in this case was taken from an order of the circuit court for Howard county, sitting as a court of equity, sustaining a demurrer to a bill of complaint filed in that court by the appellants against the appellee, for the purpose of obtaining an injunction to restrain the appellee from neglecting and refusing to properly maintain a turn-out and siding at Dorsey's Run, in Howard county; and from neglecting and refusing to maintain and run a reasonable train service of passenger and freight by or over said Dorsey's Run siding; and from neglecting and refusing to take up and set down at said siding by the passenger cars of defendant company all persons going to and from the farm of the plaintiff's; and from refusing or neglecting to leave at said siding, to be unloaded, any car in which any article or articles weighing at least 3,000 pounds shall be laden for the plaintiffs, and on which the cost of transportation shall have been paid at the place of beginning. The bill was filed June 17, 1907, and sets forth, as the grounds for its prayer for this relief, that on May 5, 1848, the defendant entered into an indenture with a certain Thomas Beale Dorsey, formerly for many years a member of this court, and Milcah Dorsey, his wife, wherein the defendant covenanted and agreed with the said Dorsey and wife, and with their heirs and assigns, to construct and maintain a turn-out and siding at Dorsey's Run on the main stem of said railroad, and also to do certain other things which in the prayer of said bill it is prayed the defendant may be enjoined and restrained from neglecting and refusing to do. The bill further alleges: That the plaintiffs have become, by mesne conveyances, enfeoffed and seised of a large part of the land owned by said Dorsey and wife at the time of the execution of said indenture, and that they

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are, as the assigns of said Dorsey and wife, entitled to enjoy the fruits of the covenant therein before recited; the said covenant, as is alleged, being a covenant running with the land. That the defendant was then at the time of the filing of the bill of complaint constructing a cut-off on the main stem of its railroad, over which it would, when completed, run its passenger and freight trains, and thus divert all passenger and freight trains from that part of its line which theretofore had passed Dorsey's Run at the siding and turn-out, which up to that time had been maintained and operated by said railroad company under the provisions of said covenant. That the plaintiffs, being advised of the intended abandonment of the Dorsey's Run turn-out and siding, communicated with the defendant, and called its attention to the covenants in said indenture contained, to which communication the defendant replied that it would abandon said turn-out and siding, but would hold itself in no way liable for a breach of said covenants, because as it claimed it was immune from liability for a breach thereof. The bill further alleges that, by the change of the location of the roadbed of said defendant company, there would be no turn-out or siding on the property of the complainants at Dorsey's Run, and that they would be entirely without the passenger or freight service from said defendant, which the defendant has covenanted to give the complainants as assignees of said Dorsey; that, when the complainants purchased the property mentioned, the fact of having a station on their property at which the freight and passenger trains of the defendant stopped was an inducement and a consideration for them to purchase the said property, and that they were advised at the time of said purchase that said covenant was one running with the land, and could not be broken by said defendant company; that the complainants were advised, and therefore charge, that no monetary compensation could recompense them should the defendant be allowed to violate its said covenants, and that a breach thereof would work a great depreciation in the value of the land belonging to them, for which they would have no adequate remedy at law; that it was not unreasonable to ask the railroad company to run and maintain a certain number of trains, passenger and freight, over its right of way passing by said Dorsey's Run, and to maintain the turn-out and siding covenanted by the defendant company to be maintained there, nor would such request be impossible of performance. The bill further alleges that the defendant has not abandoned the property of the complainants entirely, but that its tracks were still on the property of the complainants for a considerable distance; that, should the defendants be permitted to violate their covenants, the nearest station to the complainants would be Hollofields, which was distant three miles, whereas from the residence and property of the complainants to Dorsey's Run turn-out and siding was but one quarter of a mile. The bill

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also alleges, in its sixteenth paragraph, "that from the nature of the topography of the ground, and situation whereon the new line of railroad would run, it would be impossible to construct and maintain a turn-out and siding which would be accessible to the complainants." The prayer of the bill for specific relief is substantially as herein before set out, and there is also the usual prayer for general relief. With the bill was filed a copy of the deed to Priscilla J. Whalen, one of the complainants, for 567 acres, being a part of 2,200 acres of land owned by Judge Dorsey at the time of the execution of the above mentioned indenture; also a plat of the whole tract showing the location of Dorsey's Run Station, and of the so-called new "cut-off" of the railroad, and also a copy of the indenture entered into between the railroad company and Judge Dorsey in 1848.

The indenture is set out in the report of this case preceding this opinion. The legal principles involved in this appeal, all of which were elaborately argued by able counsel on both sides, and all of which are sufficiently involved in the case to require careful consideration, may be appropriately considered under three heads: First. Was the covenant, or rather were the covenants (for, while one in form, the covenant involved in this proceeding embraces several undertakings), contained in the indenture of May 5, 1848, originally valid and binding on the defendant, or void as against public policy? Second. If originally valid as between the parties, are they such covenants as run with the land in favor of the plaintiffs as assignees of Dorsey? Third. If valid, and if they inure to the benefit of the plaintiffs, are the plaintiffs entitled to have the agreement specifically enforced?

1. As to the first proposition, we think the covenants were valid and binding on the defendant at the time they were entered into, and capable then of being specifically enforced so far as the facts are disclosed by the record. In *Green v. West Cheshire Ry. Co.*, 13 Law Rep. Equity Cases, 44, a contract by the defendant railroad company to construct a siding upon plaintiff's land alongside the railroad tracks was specifically enforced. In *Lydick v. B. & O. R. R. Co.*, 17 W. Va. 427, a right of way through land was granted to the railroad company, and a verbal agreement was made by which the railroad company promised to put in a switch at a certain mill, and stop its trains at the switch. The court held because the agreement was verbal it did not run with the land, but distinctly stated that, if it had been in writing under seal, it would then be a covenant running with the land, and capable of being specifically enforced in equity. In *Aiken v. Albany R. R. Co.*, 26 Barb. (N. Y.) 289, the railroad was required to construct and maintain crossings over or under its tracks for the benefit of the farm land on each side, in pursuance of an agreement to that effect in a deed from the landowners to the railroad company. See, also, *Murray v. Northwestern Ry. Co.*, 64 S. C. 520, 42 S. E.

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617, and *Lawrence v. Railway Co.*, 36 Hun (N. Y.) 467; *Pittsburgh, etc., Ry. Co. v. Reno*, 123 Ill. 273, 14 N. E. 195. The case of *Sapp v. Northern Central Ry. Co.*, 51 Md. 124, cited by appellees, is distinguishable from these. In this latter case the court was dealing with a question involving the right or power of a railroad corporation to grant or create an easement for persons to walk along its tracks or by the side of them. As the exercise of such a power, if permitted, would be subversive of the very purpose of the railroad's creation, it was held that the corporation possessed no such power. In the case at bar we find nothing unreasonable or impracticable for the railroad to perform contained in the covenant as originally entered into, and nothing on the ground of public policy to forbid or prevent its execution at the time. We think there is a manifest distinction to be made between covenants to establish and maintain stations for the public convenience and those to establish and maintain sidings, turn-outs, crossings and the like for private use merely. The former are generally condemned as against public policy, while the latter are to be governed by the circumstances of each particular case. *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Texas & P. R. R. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; *Same v. Scott*, 41 U. S. App. 624, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94-98; *Marsh v. Fairbury Ry. Co.*, 64 Ill. 414, 16 Am. Rep. 564; *Northern Pacific R. Co. v. Washington*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *Lydick v. B. & O. R. R. Co.*, 17 W. Va. 427; *Aiken v. Albany Ry. Co.*, 26 Barb. (N. Y.) 289; *Green v. West Cheshire Ry. Co.*, 13 L. R. Eq. Cases 44; *Gilner v. Mobile Ry. Co.*, 79 Ala. 569, 58 Am. Rep. 623.

2. The next question is: Do the covenants run with the land in favor of the plaintiffs in this case? By referring to the covenant, it will be seen that the railroad company agreed to "construct and maintain" a turnout and siding at Dorsey's Run on the main stem of said railroad, and to do certain other things connected therewith; and the agreement is made, not only with the original grantors, but also with "their heirs and assigns." In *Spencer's Case*, reported in 5 Coke, 16, and also found in 1 Smith's *Leading Cases* (9th Ed.) p. 174, the question as to what covenants run with the land and what do not was fully considered by the whole court, and it was resolved in that case that when the warranty is made to one, his heirs and assigns, by express words, the assignee shall take the benefit of it, even though the covenant extend to something not then in esse, provided the thing to be done touch and concern the land. The action in *Spencer's Case* was between a lessor and the assignee of the lessee, but the principles enunciated therein have been held applicable to covenants between grantor and grantee, and their assigns, in very many modern cases. In *Glenn v. Canby*, 24 Md. 127, the court said: "The established

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doctrine is that a covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant to it. There must also be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it." In all cases covenants conferring benefits will run with the land where the rights conferred are of such a character as to attach to the land and pass as incidents thereto. 11 Cyc. 1089. The question as to whether the covenant runs with the land does not depend on its being performed on the land itself, but its performance must touch and concern the land, or some right or easement annexed or appurtenant thereto, and tend necessarily to enhance its value, or render it more convenient or beneficial to the owners or occupants. 11 Cyc. 1081. A covenant which does not touch and concern the land, as above indicated, is called a personal covenant, and binds only the covenantor, and can be taken advantage of only by the covenantee. 2 Black, Com. 304. Bouvier's Law Dictionary, tit. "Personal Covenant." In the deed from Judge Dorsey and wife the railroad company expressly covenants to do three things, which are involved in this controversy: (1) To construct and maintain a turn-out and siding at Dorsey's Run. (2) To take up and set down at said siding by the passenger cars of said company all persons going to and from the farm then occupied by the grantors. (3) To leave at said siding to be unloaded any car in which any article or articles weighing at least 3,000 pounds should be laden for the grantors, and on which the cost of transportation has been paid at the place of lading. Tested by the foregoing general principles, the third covenant seems to us to be a personal one, while the first and second are covenants real, and inure to the benefit of the plaintiffs and assignees of Dorsey and wife.

We come, then, to the third general head into which the consideration of the case has been divided; that is: Are the plaintiffs entitled to have the covenants which run with the land and enure to their benefit specifically enforced? There can be no doubt as to the right of the railroad company to change, for the purpose of carrying out the object of its creation, the location of its main stem. A railroad is in many essential respects a public highway, and the rules of law applicable to one are generally applicable to the other. *Fuller v. Dame*, 18 Pick. (Mass.) 472. The counsel for the appellees very well say in their brief "that a railroad company is a public service corporation, and is obliged to use its powers and privileges for the benefit of the public, and in aid of the public good. It must, therefore, from time to time, conform to the requirements of public travel and commerce, and adjust its

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grades, its route, and its curvatures to these needs. No contract on its face can interfere with these public duties. To compel a railroad company to maintain its main stem on the old location forever is to render it impossible for the corporation to ever make in conformity with its own needs and the public's interests any change in its transportation route." It appears from the blue print filed with the record in this case that the main stem of the defendant company, where it passed through the lands of Judge Dorsey was at the time of the execution of the indenture in question located along the south side of the Patapsco river. This river, which flows a generally easterly course, at that part of it which passes nearest to the mansion house, and former residence of the late Judge Dorsey, takes a short turn to the south, and then, after flowing a short distance, turns again to the north and east, forming at this point a loop or curve very much in shape of the letter "U," with the open part of the letter toward the north. Judge Dorsey's late residence is located about one quarter of a mile south of the river at this point, and Dorsey's Run and siding was located on the line of the old railroad near the south bend of the U-shaped curve thus formed. For the purpose of straightening its line and bettering its roadbed and train service, a cut-off was made across the upper part of the U-shaped curve in the river, crossing the river twice; and the main stem of the railroad was relocated along the cut-off, thus eliminating the sharp curve in the road at Dorsey's Run, and leaving the turn-out and siding formerly established about one quarter of a mile to the south, and on the opposite side of the river. The bill of complaint alleges "that from the nature and topography of the ground, and situation whereon the new line of railroad will run, it is impossible to construct and maintain a turn-out and siding which will be accessible" to the complainants. The bill also avers that it is not impossible of performance or unreasonable to ask the defendant still to run a certain number of passenger and freight trains daily over its old line passing by Dorsey's Run, and still to maintain the turn-out and siding at that place, as a reasonable compliance by the defendant with the terms of the covenant. Whether it would be a reasonable requirement to compel the defendant to still run a certain number of trains daily, both passenger and freight, over the old abandoned route passing Dorsey's Run, in addition to the train service required over its main stem as now located, is a question for the court to determine from all the circumstances of the case, and is not to be taken as admitted by the defendant's demurrer. The demurrer admits the truth of the facts alleged in the bill so far only as they are relevant and well pleaded. Conclusions of law deduced by the pleader, and theories as to the effect of the facts, are not admitted by the demurrer. *Miller's Equity*, § 133; *Felix v. Patrick*, 145 U. S. 333, 12 Sup. Ct. 862, 36 L. Ed. 719. There can be no doubt of the

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right and power of the directors of the railroad company to make the cut-off and change the location of its main line as indicated on the blue print for the purpose of straightening its lines and reducing its grades, and thus improving its service to meet its obligations to the public, and also to increase its earning capacity for the benefit of its stockholders. As was said in *New Central Coal Co. v. Georges Creek Coal & Iron Company*, 37 Md. 564: "The managers or directors of the corporation are the sole judges of what is proper or convenient, as well with reference to location, as to the execution of all other powers granted, as a means of attaining the object of its charter." The injunction prayed for in this case would, if granted, accomplish all that a decree for specific performance could effect, and therefore all the principles which apply to the case of a bill for specific performance apply with equal force to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for specific execution. *Maryland Telephone Co. v. Simons*, 103 Md. 141, 63 Atl. 314, 115 Am. St. Rep. 346. Specific performance is not a matter of absolute right in the party, but of sound discretion in the court, and it will not be granted, but the party will be left to his remedy at law when the performance has become impossible, or the decree would be inequitable under all the circumstances of the case.

Bearing in mind these general principles, and considering all the allegations of the bill of complaint which are well pleaded and which by the demurrer are admitted to be true together, we think that to require the defendant to still maintain a train service over its now abandoned line past Dorsey's Run as is sought to be accomplished by the prayer of the bill would impose upon the defendant an unreasonable burden wholly out of proportion to any benefit that would thereby accrue to the complainants. The railroad company appears to have faithfully complied with its covenant for nearly 60 years, and, so long as its main line remained on the former location, it could perhaps have been compelled to comply therewith, but the very purposes of its creation forbid that it should be tied to the same location forever. Whether the plaintiffs are entitled to compensation in damages for the abandonment by the defendant of the turn-out and siding, and train service, so long maintained by the appellee at that place, this court is not called upon now to determine, but we are all of the opinion that the relief prayed for in the bill of complaint must be denied, and that the appellants must be left to seek redress for any injury which they may have sustained by such abandonment in a court of law. The order appealed from will be affirmed, and the bill dismissed without prejudice to the plaintiff's right to sue at law.

Order affirmed and bill dismissed, with costs to the appellee.

BALTIMORE, C. & A. RY. CO. *v.* ENNALLS.

(Court of Appeals of Maryland, May 13, 1908.)

[69 Atl. Rep. 638.]

Corporations—Torts—False Arrest—Corporate Liability.*—Plaintiff, having purchased a basket of groceries, went to defendant's pier to ship them to his wife, and was informed that the basket would have to be covered. He was told that he might find something with which to make a covering on the wharf, and while searching for such material he was charged with having stolen the groceries from the defendant railway company by a policeman appointed by the Governor to guard its premises at its destination, as authorized by Code Pub. Gen. Laws, art. 23, § 402. The policeman presented plaintiff to defendant's superintendent, who told him to place plaintiff under arrest, whereupon plaintiff was turned over to the city police, and after being taken to the station, where he satisfied the captain that he had purchased the groceries, was discharged. Held that, though the officer making the arrest was not specifically authorized by defendant to do so, he was thereby protecting defendant's property, and his act having been ratified by defendant's superintendent, defendant was liable in an action for false imprisonment, regardless of the fact that the officer was acting with governmental authority.

Appeal from Superior Court of Baltimore City; George M. Sharp, Judge.

Action by Samuel R. Ennalls against the Baltimore, Chesapeake & Atlantic Railway Company. Judgment for plaintiff and defendant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Edward Duffy, for appellant.

BOYD, C. J. The declaration filed by the appellee against the appellant contains counts for malicious prosecution, false imprisonment, assault and battery, and assault. The principal question in the case is whether the appellant is liable for an arrest of the appellee made by Herman E. Fischer on one of its piers in the city of Baltimore. The plaintiff, who was working at Sparrows Point, purchased some groceries to send to his wife at Cambridge, Md. He testified that he took them in a basket to a pier of the defendant, where he went to the company's office and said he had a basket to ship to his wife at Cambridge and was told it would

*See third foot-note appended to *St. Louis, etc., R. Co. v. Wyatt* (Ark.), 26 R. R. R. 646, 49 Am. & Eng. R. Cas., N. S., 646; foot-note appended to *Johnston v. Chicago, etc., Ry. Co.* (Wis.), 26 R. R. R. 162, 49 Am. & Eng. R. Cas., N. S., 162.

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have to be covered. He then went on a Cambridge steamer which was at the pier and inquired of the cook, whom he knew, whether he would deliver the groceries to his family. The cook told him he would have to get a cover for the basket, and that if he went on the wharf he might find something. He went on the wharf and was a few steps from the gang board, trying to find a cover, when Fischer stopped him, put his hands on him, and said: "You stole those groceries." He replied that he had bought them and did not steal them, and said he could so show Fischer, but the latter replied: "Never mind about that. You stole them. This is the B., C. & A. sugar." The plaintiff attempted to explain, took a paper out of his pocket to show he had bought the goods; but Fischer declined to look at it, and turned him over to the city police. He was taken to the police station, where he satisfied the captain that he had purchased the groceries and was discharged.

There can be no doubt that the arrest was wholly unjustifiable, and the only question is whether the defendant is responsible for the action of Fischer. He was at the time a policeman "for the protection of the Baltimore, Chesapeake & Atlantic and Maryland, Delaware & Virginia Railway Companies, and for the preservation of peace and good order on the premises of the said company in this state," having been appointed by the Governor under the provisions of what is now section 402 of article 23 of the Code of Public General Laws of 1904, which authorizes him to commission such persons as the corporations therein named (including railroad and steamboat companies) may designate to act as policeman for the purposes above stated. It was decided in *Tolchester Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846, that the company was not bound by such a policeman's acts simply because he was appointed by the Governor at its designation, nomination, or request and his salary was paid by it, and it was held that the company was not liable in that case for assault and false imprisonment. While much that is said in that opinion is applicable to the facts of this case, there are some material distinctions between the two cases. There the policeman's acts complained of were not done on the premises of the company, and it was said that "it cannot be contended that it was done in the preservation of the property of the company." The superintendent of the company ordered the policeman to arrest the plaintiff because he pushed him into the water, and not for the protection of the company or its property. It was not shown by the plaintiff what the powers of the superintendent were, but it was proven by the defendant that he had no authority to order an arrest and bind the company for the consequences of it. It was also held that the policeman was acting as a state's officer, and his act in no way enured to the benefit of the company. In this case Fischer, when called by the plain-

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tiff, testified that the company paid his salary; that he arrested the appellee on the premises of the appellant; "that as a police among his duties is the duty to keep order on the piers and to note people on the wharf that have no business there; that he enforced the orders" of the defendant and the rules laid down by it "as far as he understood them." On cross-examination he was asked: "Your only duties with the Baltimore, Chesapeake & Atlantic Railway Company are as special police officer?"—to which he replied: "I will give it this way: My duty takes me from Pier 2 down to Pier 9, and as I go along and see anything disorderly on the wharves I take note of it. If I see any pilfering I try to break it up." And, again, when the above question was repeated, he said: "Well, it is to make arrests and keep order." Fischer was afterwards called in chief by the defendant and gave his account of the arrest. He said he "took hold of him and put him under arrest; that Ennalls said to him three times 'Let go of me,' and witness said, 'I want you to go to the superintendent's office. Witness had hold of him, leading him that way, when he met Mr. Joynes, general superintendent of the Baltimore, Chesapeake & Atlantic Railway Company, coming from his office, and beckoning to him. Mr. Joynes came and asked him where he got the goods, and he said he got them down at Steelton, and we looked at each other, and of course witness looked at him and said, 'What must I do?' and he said, 'Put him under arrest,' and witness then beckoned to officer Tennyson and he came over and took charge of him." He said on cross-examination that he "had to report to General Superintendent Joynes every day what was done that day; that the report would be sent in the next morning at 8 o'clock; that he made these reports under the orders of the general manager; that these reports would go to the general manager; that the general manager gave him orders; that he would receive such orders occasionally, not often." It is manifest that both Fischer and the general superintendent were acting under the theory that the appellee had stolen the groceries from the appellant and was in the act of carrying them away. As we have seen above, Fischer said to him when he offered to show him a paper which he had in his pocket: "Never mind about that. You stole them. This is the B., C. & A. sugar." There was some sugar in the basket, but whether he referred to that, or used the word "sugar" as a slang expression, is not shown; but he undoubtedly arrested the appellee on the assumption that he had stolen the groceries from the appellant's steamer, appealed to the general superintendent of the company to know what he must do, and when the superintendent told him to put him under arrest he then and there turned him over to the city police.

There ought not to be any question about the appellant being responsible for such action of Fischer, although he was commissioned by the state, if a corporation can be held in such a suit

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for anything short of express precedent authority or subsequent ratification. It was not intended to hold in Steinmier's Case that a corporation could not be responsible for an arrest made by a policeman commissioned by the Governor under this statute. On the contrary, it was there said: "For the purposes of this decision, and in support of our view, it is not necessary for us to hold that Fletcher was in no sense an officer of the company, and that, if called on to enforce regulations and by-laws of the company, and he did so purely because of his relation to the company, the company would not be answerable for what was wrongfully done in pursuance of that authority, but within the scope of his employment." In *Deck v. B. & O. R. R. Co.*, 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399, the detective Steiner, who, it was claimed, shot Deck, was commissioned by the state as a special policeman of the railroad company, and it was held that it was for the jury to determine whether he was acting as an employee of the railroad company or as an officer of the state. See, also, *B. & O. R. R. Co. v. Deck*, 102 Md. 669, 62 Atl. 958. In *B., C. & A. Ry. Co. v. Twilley*, in 67 Atl. 265, but not yet officially reported, which was an action against the railway company for false arrest and imprisonment, it was held to be a question for the jury whether the person making the arrest was acting in the exercise of his powers as a special police officer, or within the scope of his duty as an employee of the railroad. In *Tolchester Co. v. Scharnagl*, 105 Md. 199, 65 Atl. 916, it was said that the person making the arrest occupied a dual capacity on the boat. He was commissioned by the Governor under the statute above referred to, and also undertook the enforcement of all rules, orders, and regulations of the company among the passengers on the boat. It is true that in the last two cases the plaintiffs were passengers, but that could make no difference in so far as the question now under consideration is concerned. In this case the plaintiff swore that he went to the office of the defendant and said he had a basket to ship to his wife. It is clear from these cases that the mere fact that the person who made the arrest was commissioned under the statute as a policeman does not necessarily relieve the company of the responsibility; but, if he was at the time acting as an employee of the company and within the scope of his employment, it is liable for his act. In this case there was undoubtedly some evidence that he was acting as an employee of the company. He testified that he asked the general superintendent what he must do, and when he told him to put Ennalls under arrest he turned him over to the city policeman. He was obeying the orders of the superintendent of the company, and said that part of his duties was to enforce the rules and orders of the company. Without repeating all his testimony, we are of the opinion that the evidence, to use the language of Judge Burke in *Tolchester v. Scharnagl*, *supra*, "was amply sufficient to have

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taken the case to the jury upon the question as to whether he was acting at the time as an employee of the appellant, and within the scope of his employment." If he was acting at the time as an employee of the company, his own testimony, part of which is quoted above, is ample to show that his act was within the scope of his employment.

It was not necessary, as the appellant seems to contend, to show that Fischer was specially authorized by the company to make this particular arrest. In *Carter v. Howe Machine Co.*, 51 Md. 290, 34 Am. Rep. 311, which was the first case in this state in which it was distinctly held that a corporation could be held liable for a malicious prosecution, Judge Alvey stated the rule governing the liability of corporations for the acts of their agents thus: "If, therefore, property be intrusted to an agent or servant for sale or safekeeping, there is clearly an implied authority to do all such things as may be proper and necessary for the protection of that property; or, if a servant be assigned to a position requiring the performance of certain duties, he has an implied authority to do all such things as may be required to enable him to perform those duties. And for all acts done within the scope of the employment and the limits of the implied authority the master is liable, however erroneous, mistaken, or malicious such acts may be; but for acts done beyond that limit the corporation cannot be made liable, unless express authority has been shown, or there be subsequent adoption or ratification of the act complained of." He illustrated the distinction by citing some cases, amongst them *Allen v. L. & S. W. R. Co.*, L. R. 6 Q. B. 65, in which Mr. Justice Blackburn said: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice." It is only necessary to keep that distinction in mind to understand why it was said in *Carter v. Howe Machine Co.*, *Beiswanger v. Amer. Bonding Co.*, 98 Md. 287, 57 Atl. 202, and other similar cases which might be cited, that it was necessary to show that the agent was expressly authorized by the corporation to procure the arrest, or that it subsequently ratified it. Both of those mentioned above were actions of malicious prosecution for prosecuting the plaintiffs for embezzlement, and in such cases nothing done by the agents was for the purpose of protecting property in their charge by preventing a felony or recovering it back, but they were attempts to punish the offenders for what

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they had already done. There was, therefore, no implied authority in the agent in such case to act, and it was necessary to prove that he was expressly authorized by the corporation to do so. If that were not so, then any corporation would be at the mercy of indiscreet, overzealous, or perhaps dishonest agents; but that is altogether different from the facts disclosed in this record, as we have in part pointed out. Fischer was undertaking to prevent the appellee from feloniously taking away the property of the appellant from its wharf or steamer, as he and the general superintendent believed, as we must in justice to them assume, and he was not simply instituting proceedings against, or causing the arrest of, a party for a crime which he supposed had been previously committed, as is illustrated by Carter's Case, Beiswanger's Case, Green's Case, 86 Md. 161, 37 Atl. 642, and others which might be cited.

Without deeming it necessary to discuss the rulings on the prayers separately, we find no error in them, and will affirm the judgment.

Judgment affirmed, the appellant to pay the costs above and below.

AMERICAN LUMBER CO. v. TOMBIGBEE VALLEY R. CO.

(Supreme Court of Alabama, Feb. 13, 1908.)

[45 So. Rep. 911.]

Railroads — Contracts — Grant of Exclusive Use.—An attempted grant by a railroad company that is a common carrier of passengers and freight to a purely private business corporation of the right to use the road to an extent which might exclude all other use is in violation of public policy.

Same—Leases.*—In the absence of express legislative authority, one railroad company has no power to lease its road or other property to another railroad corporation, though a common carrier; and such an attempted lease is void as against public policy.

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Suit by the American Lumber Company against the Tombigbee Valley Railroad Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The case made by the bill is that a contract was entered into between the appellant and appellee on the 29th day of January, 1906, the substance of which is as follows: (1) That the rail-

*See foot-note appended to *Kaufman v. Pittsburgh, etc., Co.* (Pa.), 27 R. R. R. 598, 50 Am. & Eng. R. Cas., N. S., 598.

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road company, which operates a line of railway from Nannahubba Bluff, in Mobile county, Ala., to Millry, in Washington county, Ala., lets and leases to the said American Lumber Company, its successors or bona fide assigns, the right or privilege for a period of 10 years from the 1st day of February, 1906, to operate over the said line of railroads such trains as the said lumber company and its successors may desire to operate for the purpose of transporting and carrying thereover all logs or other property which they are permitted to transport over the said railroad under the terms hereof; the said operation to be regulated by the following terms and provides: (2) The lumber company to supply its own trains, including cars, motive power, and other equipment, and shall operate its trains at its own expense, and shall carry only certain things mentioned in the contract not necessary to be here set out. (3) The operation of the trains over the track of the said railroad company shall be in obedience to the reasonable train orders of the trainmaster of said railroad company, or of whoever may then be operating the said railroad. That said railroad shall keep its side track in reasonably safe condition for operation, and shall promptly give proper and reasonable train orders for the operation of all trains which said lumber company may desire to run over the said track, etc. (4) Provides for the joining and spur tracks built by the lumber company and for the transportation of fuel and employees, etc. 5, 6, 7, 8, 9, and 10 are not necessary to be set out. (11) It is the intention hereof that the right to operate trains over the said railroad hereby vested in the said lumber company shall be and remain in said lumber company and its successors for the full term and for the full extent herein provided, no matter into whose hands the said railroad may pass, and that the said rights shall attach to and follow the said railroad. The other provisions of the contract are not necessary to be set out.

The contention of the appellant is that the bill is for the protection by injunction of the lumber company's vested property rights in the railroad described, by virtue of sections 1, 2, and 11 of the contract; while the contention of the appellee is that the bill seeks to enforce a specific performance of a nonenforceable contract. The bill alleges the refusal of the railroad company to permit it to operate its logging trains, and also a refusal on the part of the railroad company to issue the necessary and proper train orders for the operation of its trains, and seeks a mandatory injunction to impel the doing of these particular things, and for other relief not necessary to be here set out.

Stevens & Lyons, for appellant.

Gregory L. & H. T. Smith, for appellee.

TYSON, C. J. The chancellor entertained the view that the bill in this case was in effect, if not in terms, one to compel the

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specific performance of a contract; that to effectuate the preliminary writ of injunction and to grant relief, whether mandatory to compel performance of the contract or to prohibit its violation on the part of the respondent, would amount substantially to a decree requiring the performance of the terms of the contract; that, such being the nature and purpose of the bill, it was without equity, for want of mutuality of remedy between the parties. If such be the nature of the relief sought, it is conceded by appellant's counsel that the decree appealed from was correct. But it is contended by appellant, in order to avoid this result, that under the contract it acquired an absolute and unqualified leasehold interest in the railroad—a right in rem as distinguished from a personal contractual obligation to operate its trains over the road; that its acquired leasehold right under the contract was a vested one, and property to which it has a title for the period of 10 years from the date of the making of the contract, to wit, January 29, 1906; that, such being the status of complainant with respect to the ownership of the road for the period of time named, it has the right to the use of the road to its full capacity for the hauling of its logs, to the exclusion of the defendant. And, logically, the complainant's right to the full enjoyment of the road, to the end of striking down defendant's duty, as a quasi public corporation, to the public, must be conceded, if the contract confers such a property interest upon complainant as is contended for. Upon the theory that the contract conveys to complainant an absolute and unqualified right of enjoyment of a leasehold interest, unfettered by any limitations upon this right, it is asserted that the equity of the bill can and should be rested upon the protection of that right, and not upon the specific performance of the contract. To the end of protecting this right, it is said, any encroachment upon its quiet enjoyment and exercise will be prevented by injunction.

All this may be conceded, though such a construction of the contract, it seems to us, is wholly inadmissible; yet, it appearing by the averments of the bill that the respondent is a railroad company and a common carrier of passengers and freight, the attempted grant or investiture of the right or interest in complainant—a purely private business corporation—to the extent contended for would be clearly a violation of the public policy of the state, if not directly inhibited by section 242 of the Constitution of 1901. The recognition and the protection of such a grant by injunction would be a warrant to railroad companies, by leases of their tracks, to rid themselves of the duties and responsibilities of common carriers, and would enable them, after obtaining franchises as public serving corporations, to abandon their public functions and duties by conferring the use of their franchises and properties upon any private concern they might select. If

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- such a principle is once established, it would be but a short step to hold that public carrying corporations might entirely abandon their public functions and duties, and prostitute the uses of the franchises and privileges granted to them into enterprises for purely private gain, to the exclusion of the rights of the public. Indeed, the absence of express legislative authority, one railroad company has no power to lease its road or other property to another railroad corporation, though a common carrier, and such an attempted lease is void as against public policy. *George v. Central R. & B. Co.*, 101 Ala. 607, 619, 14 South. 750; *M. & C. R. R. Co. v. Grayson*, 88 Ala. 572, 7 South. 122, 16 Am. St. Rep. 89.

The decree appealed from must be affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

CITY OF SEATTLE v. SEATTLE & M. R. Co.

(Supreme Court of Washington, July 28, 1908.)

[96 Pac. Rep. 958.]

Municipal Corporations—Local Improvements—Assessments—Validity.*—Under Laws 1905, p. 84, c. 55, providing for the levy of special assessments for local improvements on property benefited by commissioners appointed by the superior court, the determination of the commissioners, forming an assessment district, that a railroad right of way abutting on a street is benefited by the improvement of the street is proper, where the abutting property would be benefited, on it being used for other than railroad purposes.

Constitutional Law—Delegation of Legislative Powers.—Laws 1905, p. 84, c. 55, providing for special assessments for local improvements and for appointment of commissioners, when construed in its entirety, limits the functions of the superior court to the appointment of the commissioners, and to a judicial review of the assessment roll returned by them; and it is not invalid, because delegating legislative power to the superior court, and delegating legislative power to levy assessments to others than the corporate authorities of the municipal subdivisions of the state.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Proceedings by the city of Seattle to confirm an assessment for

*For the authorities in this series on the question whether railroad property is subject to local assessments, see foot-note appended to *Chatham County Com'rs v. Seaboard A. L. Ry.* (N. Car.), 11 R. R. R. 859, 34 Am. & Eng. R. Cas., N. S., 859, where all these preceding it are collected; foot-note appended to *Heman Construction Co. v. Wabash R. Co.* (Mo.), 26 R. R. R. 555, 49 Am. & Eng. R. Cas., N. S., 555.

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local improvements against property owned by the Seattle & Montana Railroad Company. From a judgment of confirmation, the owner appeals. Affirmed.

L. C. Gilman and *R. C. Saunders*, for appellant.

Scott Calhoun and *Ralph S. Pierce*, for respondent.

PER CURIAM. This is an appeal from a judgment of the superior court of King county confirming an assessment for local improvements against certain lots and parcels of land owned by the Seattle & Montana Railroad Company and occupied by it as a part of its right of way. In support of its appeal the appellant contends (1) that the property assessed was not "actually benefited," within the meaning of the act of March 3, 1905 (Laws 1905, p. 84, c. 55), under which the assessment was levied; and (2) that that act is unconstitutional.

On the question of benefits the court made the following findings: "(4) That each and all of said lots and tracts were at the time of said assessment, and are now, occupied by two main tracks of the Seattle & Montana Railroad Company, which forms a part of the Great Northern Railway System, which system extends through the states of Minnesota, North Dakota, Montana, Idaho, and Washington, and over which there was at the time said assessment was made, and is now, conducted by a common carrier, a general interstate railway business. That the right of way over said lots and tracts from a connection between said main line of said railway system and the terminals of said railway system in the city of Seattle, upon which said terminals is located a large and expensive passenger depot used by said common carrier as a general passenger station in the city of Seattle, and said right of way was at the time of said assessment, and is now, devoted exclusively to use for right of way and trackage purposes only, for said main tracks, together with a number of side tracks maintained thereon. (5) That the whole surface of said lots and tracks before mentioned was at the time of said assessment, and is now, graded to a level of from 36 to 22 feet below the grade of Fourth Avenue South and other abutting streets, and that all access by said Fourth Avenue South to and from said lots and tracks, and each thereof, is barred by a concrete retaining wall which said Seattle & Montana Railroad Company is required by the terms of Ordinance No. 10,545 of the city of Seattle to construct along the west line of said Fourth Avenue South, which has already been partially completed a long distance along said west line, and which, when completed, will rise at least 22 feet above the level of said lots and tracts. That said railway tracks on said lots and tracts enter a tunnel a little over a mile in length running under the city of Seattle at a point on the west side of Fourth Avenue South and the north terminus of the lots above described at a grade of 36 feet below the grade of Fourth

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Avenue South as said grade is permanently established by the improvements for which this assessment is made. That said tunnel is an expensive structure, adapted for permanent use for railway purposes only, and constitutes an essential part of said system, and the main connecting link between the terminals of said system in the southern part of the city of Seattle and the eastern terminus of said system, and that through it run two main tracks of said system on the same grade as said tracks are laid and maintained on the lots and tracts before mentioned. (6) That all of said lots and tracts have been for a long time prior to the assessment herein, and are now, exclusively devoted to railway use as right of way to carry and sustain railway tracks, and that by reason of their grade, of their location, and of their connection with the tunnel aforesaid, and the passenger station aforesaid, and of the great expense incurred by the Great Northern Railway System in so locating and adapting them to railway uses, they are permanently adapted to right of way and railway uses, and that character of use is the only use to which said lots and tracts are now adapted, and the only use to which they will be permanently adapted while they continue in the condition now fixed by the improvements and expenditures heretofore found. (7) That the aforesaid lots and tracts are not, nor any of them, nor any part or portion of them, actually benefited by the improvement for which they are assessed herein, while and as long as they are devoted to the use hereinbefore found. (8) That said lots and portions of vacated streets, if and when devoted to any other uses than the uses hereinbefore found, are and will be actually benefited to the amounts severally assessed to each thereof in said assessment roll." While these specific findings may not have been made in the case of Northern Pacific Railway Co. v. City of Seattle, 91 Pac. 244, 12 L. R. A. (N. S.) 121, the same facts and conditions were nevertheless present in that case and were fully considered by this court.

The appellant contends, however, that the Northern Pacific Case, is not in point here, because the assessment district there involved was created by ordinance of the city of Seattle, and the court deemed the legislative declarations of benefits conclusive upon it. The court did no doubt consider the effect to be given to such legislative declaration; but the decision was not rested exclusively upon that ground, for in answer to the contention the appellant now makes the court said: "The appellant contends that the land held and used by it as a right of way cannot be assessed for local street improvements; that a special assessment can only be levied when a special benefit produced by the improvement inures to the property assessed; that, unless it can be affirmatively shown that some special benefit does result, no assessment can be imposed; that the strip of land used solely as right of way for railway trains is not benefited by the improve-

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ment of an abutting street; that the public use to which the land is exclusively devoted is not thereby rendered more valuable; that trains can pass and repass as well without as with the improvement; that appellant only occupies its land as a right of way, not owning the fee; and that its easement is not subject to special assessment. Although the appellant may not hold the fee-simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant is therefore for all practical purposes the substantial owner. The fee, subject to its use and easement, is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself, affecting its value." Furthermore, if any presumption is to be indulged in favor of a legislative declaration of benefits, the like presumption will attach to any assessment district created by legislative authority. Here the assessment district was established by three commissioners appointed by the superior court, pursuant to legislative authority. These commissioners acted in an administrative or legislative capacity in forming the assessment district and the usual presumption attaches to their acts in that regard. We do not think, therefore, that the case can be distinguished on this ground.

The objection to the validity of the legislative act is twofold: First, because it purports to delegate legislative power to the superior court; and, second, because it purports to delegate legislative power to levy special assessments to others than the corporate authorities of the municipal subdivisions of the state. The constitutionality of the act of March 9, 1893 (Laws 1893, p. 189, c. 84), was considered by this court in *Re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, and the objections to the validity of the present act were there decided adversely to the appellant, excepting one to be presently noted. Section 22 of the act of 1905, *supra*, provides as follows: "It shall be the duty of the superior judge and such commissioners to examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvements will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion; and having found said amounts to apportion and assess

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the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement: Provided, that no lot, block, tract or parcel of land shall be assessed a greater amount than it will be actually benefited, nor shall any lot, block, tract, or parcel of land which shall have been found by the jury or court to be damaged be assessed for any benefits; and provided, further, that it shall not be necessary for said commissioners to examine the locality excepting where the ordinance provides for the establishment, opening, widening or improvement of streets, avenues, alleys or highways. Such part of the compensation, damages and costs as is not finally assessed against property benefited shall be paid from any general funds of the city or town applicable thereto." Laws 1905, p. 91, c. 55, § 22. If this section should be construed literally, and the act should be held to require the judge of the superior court to go out with the commissioners to examine the property and assist in the formation of the assessment district and the preparation of the assessment roll, it would be difficult, and perhaps impossible, to sustain the act on constitutional grounds. But from a consideration of the entire act we are satisfied that the superior judge was included in this section through inadvertence, and that when the act is construed in its entirety the functions of the superior court are clearly limited to the appointment of the commissioners and a judicial review of the assessment roll returned by them. As thus construed the act is fully sustained by the decision in the Westlake Case.

From a consideration of the entire record, we are satisfied that the decision in this case is controlled by the decisions in the two cases cited, and for the reasons there stated the judgment is affirmed.

FULLERTON and RUDKIN, JJ., took no part in the decision in Northern Pacific Ry. Co. v. Seattle, *supra*, and do not concur in the conclusions there announced.

NORTH WISCONSIN CATTLE CO. *v.* OREGON S. L. R. CO. *et al.*

(Supreme Court of Minnesota, July 31, 1908.)

[117 N. W. Rep. 391.]

Corporations—Foreign Corporations — Actions — Service of Process.*—The statute (Rev. Laws 1905, § 4109, subd. 3) relating to the service of summons on a foreign corporation by delivering a copy to any of its agents, requires that the agent upon whom service is made must be such in fact, and that the corporation must be doing business in this state. *Wold v. J. B. Colt Co.*, 102 Minn. 386, 114 N. W. 243, followed.

Same—"Doing Business in the State."*—The summons in this case was served on an agent of the respondents, who was soliciting, within the state, passenger and freight traffic to be routed over their lines, none of which was in this state. Held, that the corporations were not "doing business in the state," within the meaning of the statute, and that the service of the summons was rightly set aside.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; David F. Simpson, Judge.

Action by the North Wisconsin Cattle Company against the Oregon Short Line Railroad Company and the Union Pacific Railway Company. From an order setting aside service of summons, plaintiff appeals. Affirmed.

How, Butler & Mitchell, for appellant.

Howard S. Abbott, Rome G. Brown, Chas. S. Albert, and Arnold L. Guesmer, for respondents.

START, C. J. This action was brought in the district court of the county of Hennepin by the plaintiff, a foreign corporation, against the defendants, the Union Pacific Railway Company, and the Oregon Short Line Railroad Company, foreign corporations existing, respectively, by virtue of the laws of the state of Utah, and the Chicago, Milwaukee & St. Paul Railway Company, a foreign corporation existing by virtue of the laws of the state of Wisconsin, to recover damages caused by the alleged negli-

*For the authorities in this series on the questions as to where actions against railroads may be brought, and upon whom in such actions summons may be served, see foot-note appended to *Coakley v. Southern Ry. Co.* (Ga.), 13 R. R. R. 371, 36 Am. & Eng. R. Cas., N. S., 371, where all those preceding it are collected; foot-note appended to *Central of Georgia Ry. Co. v. Eichburg* (Md.), 27 R. R. R. 356, 50 Am. & Eng. R. Cas., N. S., 356; *Peterson v. Chicago, etc., R. Co.* (U. S.), 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247; *Green v. Chicago, etc., Ry. Co.* (U. S.), 25 R. R. R. 194, 48 Am. & Eng. R. Cas., N. S., 194; foot-note appended to *Nelson v. Chicago, etc., R. Co.* (Ill.), 23 R. R. R. 668, 46 Am. & Eng. R. Cas., N. S., 668.

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gent handling by the defendants of a train load of sheep transported from Mampa, Idaho, to St. Paul, Minn. The contract of shipment of the sheep was not made within this state, nor did the alleged cause of action arise therein. Service of the summons upon the defendants Union Pacific Company and the Oregon Company, respectively, was made by serving the same on their alleged agent, Mr. D. M. Collins, at the city of Minneapolis. Thereupon such defendants appeared specially and moved the court to set aside such service of the summons, upon the ground that at the time it was made neither of them was within the state of Minnesota, nor was the person upon whom the summons was served the agent of either of them. The trial court made its order setting aside the service of the summons, from which the plaintiff appealed.

It is obvious from the record that, if the order appealed from was correct as to the Union Pacific Company, it was also as to the Oregon Company; hence the first and perhaps the only question for consideration is whether the order was right as to the Union Pacific Company. The ultimate facts relevant to this question are briefly summarized by the trial judge, as follows: "It appears that D. M. Collins and H. F. Carter are, and for some time past have been, in the employ of this defendant. The defendant maintained a permanent office in the city of Minneapolis for their use, and hired to assist them some other employees. Collins and Carter are, respectively, engaged in influencing shippers of freight and prospective passengers to use the lines of the Union Pacific Railroad Company. They do not make contracts with shippers or passengers, but get results, if at all, by inducing such shippers and passengers, when making contracts with other roads, to route goods or buy tickets over the Union Pacific lines. Carter frequently purchases for a passenger, from railway companies other than the Union Pacific, a ticket routed over the Union Pacific, and receives from the passenger the price of such ticket, either before or after he obtains the ticket from the selling railway company, and pays over such price to the selling company in each case. The business done by them is fairly described as soliciting business for and advertising their employer. The company for the carrying on of this business maintains in this state a permanent office on a fairly extensive scale; and from it, by virtue of the ordinary contracts existing between initial and connecting carriers for through freight and passenger service, receives freight and passenger business originating in this state. The permanent office force it maintains in this state is greater than the entire office force necessary for carrying on an independent enterprise of quite respectable proportions." Neither defendant has any railway line within the state. This summary is fully sustained by the evidence.

Counsel for plaintiff, however, claims that the defendant sells,

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within the state, tickets to passengers, and therefore it makes contracts within the state. The evidence does not justify the premise of the proposition, for it does not establish the alleged fact that defendant sells passenger tickets within the state. It is true that the alleged agent frequently purchases for a passenger tickets from railway companies other than the defendant routed over its line with the money of the passenger, which is paid to the selling company in each case; but the evidence fairly justifies the conclusion that in so doing the alleged agent acts as the messenger of the passenger and for his accommodation, and not for the defendant. We have, then, the question whether, upon the ultimate facts herein stated, the summons was duly served upon the defendant, within the meaning of our statute (Rev. Laws 1905, § 4109, subd. 3), which reads as follows: "If the defendant be a foreign corporation, the summons may be served by delivering a copy to any of its officers or agents within the state." While this is a change in the language of the former statute in reference to service of process on a foreign corporation, yet it is not a change in substance as to the representative capacity and derivative authority of the agent upon whom the summons may be served. The present statute, as well as the one it superseded, requires that the agent of a foreign corporation, upon whom a summons in an action against it may be served, must be an agent in fact, not merely by construction of law, having representative capacity and derivative authority, and the corporation which he represents must be doing business in this state. *Wold v. J. B. Colt Co.*, 102 Minn. 386, 114 N. W. 243. In the case of *Mikolas v. Walker & Sons*, 73 Minn. 305, 76 N. W. 36, the court, with reference to the former statute, said that: "The statute does not define the word 'agent'; but, as the service of process goes to the jurisdiction of the court over the person, it must be so construed as to conform to the process of natural justice, and so that the service will constitute 'due process of law.' To do this the agent must be one having in fact a representative capacity and derivative authority. Such agent must be one actually appointed and representing the corporation as a matter of fact, and not one created by construction or implication, contrary to the intention of the parties."

The statute does not require in express terms that the foreign corporation must be doing business within the state, in order to justify the service of a summons against it upon its agent; but this is necessarily implied, for it could not be represented within the state by an agent unless it was doing business therein. Whether such a corporation is doing business in the state is a question of jurisdiction, and in its last analysis it is one of due process of law, under the Constitution of the United States. However, the decisions of our own court on the question are in harmony with those of the federal Supreme Court. *Green v.*

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Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. The facts in the case last cited were quite similar to those in the case at bar. In that case the defendant, an Iowa railway corporation having none of its tracks in Pennsylvania, for the purpose of soliciting business in that state, employed an agent, hired an office for him in Philadelphia, and designated him as its district and passenger agent. His business was to solicit and procure passengers and freight to be transported over the defendant's lines. He conducted such business for the defendant, with the assistance of several clerks and traveling and passenger agents, who reported to him. In short, he did everything, and more, for the defendant, with respect to such business in the state of Pennsylvania, that the agent in the case at bar did in Minnesota for the defendant herein. It was held in the case cited that: "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business,' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

Counsel for the appellant urge that the Green Case, properly understood, supports their contention that the service of the summons in this case was valid. The contention, in brief, is, in substance, that in the Green Case there was no statute providing for the service of the summons on a foreign corporation doing business in a state or district; that the case impliedly holds that if there had been such a statute the defendant would have been amenable to process in Pennsylvania; that there is such a statute in our state; that the defendant impliedly consented that process might be served upon it within the state, in the manner provided by the statute, by entering the state and doing any kind of business therein; that the defendant did have agents in the state to solicit freight and passenger traffic, which was business; and therefore it consented that process against it might be served on them. If the statute were to the effect that any foreign corporation having an agent in the state for the solicitation of freight and passenger traffic over its lines outside of the state might be served with process by delivering a copy thereof to such agent, there might be, possibly, a substantial basis for the claim urged. The statute, however, does not define the character of business the doing of which in the state will subject it to the process of the court by service on its agents. It simply provides that service may be made upon the agent of the corporation. Therefore a foreign corporation sending its agents into this state impliedly consents that, if they do for it any acts which constitute doing business within the state, as that term is defined by its courts, process against it may be served on such agents. The solicitation of passenger and freight traffic in the state is not within that term.

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We accordingly hold that the facts of this case do not justify the conclusion that the respondents herein were, or either of them, doing business within this state, so as to authorize the service of the summons upon their soliciting agent.

Order affirmed.

LEWIS v. PENNSYLVANIA R. Co.

(Supreme Court of Pennsylvania, March 2, 1908.)

[69 Atl. Rep. 821.]

Carriers—Carriage of Passengers—Who Are “Passengers”*—“Fellow Servants.”—One not in the employment of a railroad company, but using its facilities under a contract between the railroad company and his employer, the Pullman Car Company, which simply permits his carriage for and in connection with the business of his employer conducted on the railroad, is not a “passenger,” but a fellow servant, under Act April 4, 1868 (P. L. 58), of the trainmen.

Constitutional Law—Vested Rights—Exemption of Railroads from Liability.—Act April 4, 1868 (P. L. 58), exempting railroad companies from liability for personal injuries and death in a particular class of cases, vested in railroad companies a right to exemption in such cases, which the Legislature may not interfere with by repeal of the act.

Same.—Act June 10, 1907 (P. L. 552), repealing Act April 4, 1868 (P. L. 58), exempting railroad companies from liability for personal injuries and death in a particular class of cases, does not affect the exemption of railroad companies from liability in cases in which the cause of action accrued prior to the passage of the repealing act.

Master and Servant—Injury to Servant—Negligence of Fellow Servant.†—In an action by the wife of a sleeping car conductor

*For the authorities in this series on the question whether the employees of others, while being transported by a railroad company, are the passengers of the latter, see second foot-note appended to *Clough v. Grand Trunk Western Ry. Co.* (C. C. A.), 26 R. R. R. 660, 49 Am. & Eng. R. Cas., N. S., 660, where those preceding it are collected; foot-note appended to *Chicago & N. W. Ry. Co. v. O'Brien* (C. C. A.), 27 R. R. R. 234, 50 Am. & Eng. R. Cas., N. S., 234; *Southern Ry. Co. v. Cullen* (Ill.), 24 R. R. R. 195, 47 Am. & Eng. R. Cas., N. S., 195; *Davis v. Chesapeake & O. Ry. Co.* (Ky.), 24 R. R. R. 170, 47 Am. & Eng. R. Cas., N. S., 170.

For the authorities in this series on the question whether employees of different masters may be fellow servants of each other, see foot-note appended to *Miller v. Northern Cent. Ry. Co.* (Pa.), 24 R. R. R. 481, 47 Am. & Eng. R. Cas., N. S., 481; *Pittsburg, etc., Ry. Co. v. Bovard* (Ill.), 22 R. R. R. 122, 45 Am. & Eng. R. Cas., N. S., 122.

†See second foot-note appended to *Chicago, etc., Co. v. Giese* (Ill.), 27 R. R. R. 195, 50 Am. & Eng. R. Cas., N. S., 195.

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against a railroad, for the death of her husband, killed in an accident in which the train he was riding on ran into freight cars which had buckled on the next track, the happening of the accident raises no presumption of negligence against the railroad company, and plaintiff is bound affirmatively to prove negligence, and where the accident was due to the negligence of a trainman on the freight train, no recovery can be had, since the accident was due to the negligence of a fellow servant under Act April 4, 1868 (P. L. 58).

Appeal—Presentation and Reservation of Grounds of Review—Exceptions—Necessity.—Where the court enters judgment for defendant non obstante veredicto, and thereafter counsel for plaintiff ask leave to file an additional exception containing new matter, and the same is disallowed without any exception being taken to the order of disallowance, the appellate court has nothing on the record before it which calls for consideration of the new matter contained in the exception disallowed.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Frances Hess Lewis against the Pennsylvania Railroad Company for the death of plaintiff's husband. Verdict for plaintiff for \$18,000, on which judgment was entered for \$10,000; all above that amount having been remitted. Subsequently judgment was entered for defendant non obstante veredicto, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Francis Fisher Kane, Warren C. Graham, and John Cadwallader, Jr., for appellant.

C. Andrade, Jr., John Hampton Barnes, and John E. Faunce, for appellee.

STEWART, J. The plaintiff's husband, while in the course of his regular employment as a Pullman car conductor, lost his life in an accident that happened on the line of the Pennsylvania Railroad Company. While it is not admitted that he was in the class distinguished from passengers by Act April 4, 1868 (P. L. 58), we do not understand it to be seriously contended that he was not. Our repeated and explicit decisions to the effect that one not in the employment of a railroad company, but using its facilities under a contract between the railroad company and his employer, which simply permits his carriage for and in connection with a business of his employer conducted upon the railroad, is not a passenger, leaves no room for controversy on this branch of the case. It is only necessary to refer to *Miller v. Cornwall Railroad Co.*, 154 Pa. 473, 26 Atl. 779, and the very recent case of *Smallwood v. Baltimore & O. R. R. Co.*, 215 Pa. 540, 64 Atl. 732. The real effort here is to give the repealing act of June 10,

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1907 (P. L. 522), the effect of obliterating wholly the act of April 4, 1868, and investing the plaintiff with the right of action and recovery she would have had, had the latter act never been passed. The argument in support of this contention is based on the propositions: (1) That the present action was still pending and incomplete when the repealing act was passed; (2) that the repealing act is remedial in character; and (3) that the act of 1868 was within that class of statutes which affect the subject of jurisdiction. If the first be established, it is argued that, according to accepted rules of construction, the act of April 4, 1868, having been repealed, it is to be considered as though it had never existed as law, except for purpose of actions which were commenced and concluded before its repeal, and that it can impose no limitations upon the plaintiff's rights. If the second be made good, it is argued that since by its terms the repealing statute is not confined to cases thereafter to arise, it is to be given a liberal construction; and to effect the legislative intent it must be held to apply to past as well as future cases. If the third be conceded, the repeal of the act of 1868 restored the right of action as it was before the act of 1868 was passed.

Neither of these propositions is conceded by the other side, and it is enough for us to say that all, so far as it is sought to apply them to this case, are disputable. They call for no more decided expression of view from us, since, if their correctness be conceded, they would make nothing for the plaintiff's ultimate contention. That a repealing statute, so far as it provides for a change in procedure, may and does apply to actions pending is a proposition which admits of no dispute. No one can claim to have a vested right in any particular mode of procedure for an enforcement or defense of his rights. When a new statute deals with procedure only, *prima facie*, it applies to all actions—those which have accrued or are pending, and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceeding. Sutherland on Statutory Construction, § 482, and the authorities there cited. Again, if the act of June 10, 1907, be remedial, while it may be proper in that case to give it liberal construction to carry out the legislative intent, such construction must stop short of imputing to the Legislature a purpose to do something that is beyond its power. Conceding that the act of April 4, 1868, affected the jurisdiction of the court, and its repeal restored the right of action and recovery as it was before the law was passed, it by no means follows that the plaintiff can claim any advantage from such restoration in her present action. The argument, on behalf of appellant, overlooks wholly the effect the construction contended for would have on the correlative rights of the defendant. The act, which is here complained of as having caused the death of plaintiff's husband, occurred while the statute of 1868

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was in force. As the law then was, plaintiff's right of action was only such as she would have had, had her husband been an employee of the defendant company. This indicated the full extent of defendant's liability at that time. It is because of counsel's full appreciation of the added liability, by reason of the repeal of that act, that the vigorous effort is here made to escape from its limitations. The repeal of the act of 1868 makes railroad companies liable under circumstances which before exempted them. It is entirely competent for the Legislature to make such changes, and impose liability where none was before, but legislation of this kind cannot operate retrospectively, but must be confined to future occurrences. A legal exemption from a demand made by another is a vested right; which the Legislature may not interfere with. Even an expressed purpose that an act shall have such retroactive effect is without avail. A statute, which assumes to give character to facts which they do not possess at the time they took place, and attaches to them legal consequences from which they were exempt antecedent to the time of its passage, is, in its essential nature, *ex post facto*; and all such laws are considered as founded on unconstitutional principles, and therefore inoperative and void. In a general, literal sense an *ex post facto* law is one passed in regard to an act after the act is done; but in its most comprehensive definition it includes all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or criminal nature. Potter's Dwarrior on Statutes, p. 167. While, because of the distinction which now obtains between *ex post facto* and retroactive laws, limiting the former to laws governing penal offenses, such a statute as that referred to may not be held to offend directly against the constitutional provision invalidating *ex post facto* laws, none the less is it invalid as an interference with vested rights, which, by statutory limitations upon the exercise of sovereign power, are secured against invasion or impairment. It requires no lengthy citation of authorities to show that a right of action is a vested right within the constitutional protection. It was clearly and explicitly so decided in *Kay v. Pennsylvania Railroad Company*, 65 Pa. 269, 3 Am. Rep. 628, where the effect of this very act of 1868 on causes of action which arose before its passage was considered.

All authorities agree that the repeal of a statute does not take away the plaintiff's cause of action under it for damages for an injury to person or property. They rest on sound doctrine, expressed in *Menges v. Dentler*, 33 Pa. 495, 75 Am. Dec. 616, and repeated in *Kay v. Pennsylvania Railroad Company*, 65 Pa. 269, that the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated. A legal exemption from liability on a particular demand, con-

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stituting a complete defense to an action brought, stands on quite as high ground as a right of action. If the law of the case at the time when it became complete is such an inherent element in it that a plaintiff may claim it as a vested right, on what possible ground can it be held that a defendant has no vested right with respect to an exemption or defense? The authorities make no distinction between them. "So he who was never bound either legally or equitably cannot have a demand created against him by mere legislative action." Cooley's Constitutional Limitations, p. 528. "A vested right is property, as tangible things are, when they spring from contract or the principles of the common law. There is a vested right in an accrued cause of action, in a defense to a cause of action, even in the statute of limitations when the bar has attached, by which an action for a debt is barred." Sutherland on Statutory Construction, § 480. "A law can be repealed by the lawgiver; but the rights which have been acquired under it, while it was in force, do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it had produced. This is a principle of general jurisprudence; but a right, to be within its protection, must be a vested right. It must be something more than a mere expectation, based upon an anticipated continuance of existing law. It must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another." Sutherland on Statutory Construction, § 164. Since the effect of the construction contended for would be to impose a liability for a past occurrence where none existed at the time, or, what is the same thing, take away a legal defense available at the time, it is to be avoided. It follows that the plaintiff's case is to be adjudged under the act of 1868, the law of the case when the present cause of action became complete. Her rights are just what they would have been had her husband been an employee of the defendant company.

The explanation of the accident advanced by the plaintiff was that in bringing to a stop the freight train, which at the time occupied an adjoining track, by applying the air brakes with which the first 34 of the cars on the train were equipped, while no use was made of the hand brakes of the remaining cars, the rear cars were stopped only by the resistance of those in front, and that the violence of this impact was such as to cause the train at this point to "buckle" and fall over to some extent on the other track, thus occasioning the obstruction that caused the accident. The thirty-sixth car from the engine in this freight train, and the second in the series not supplied with air brakes, was freighted with high explosives. Under the theory of the plaintiff this car was just where it would receive the greatest force of the impact. The obstruction resulted from the buckling, presumably of the first car of the after series, collision followed, producing

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explosion of material in the second car, then the fire. Assuming these to be established facts in the case, it is sought to derive an inference of negligence on the part of defendant from the manner in which the car containing the explosives was transported. That the explanation thus advanced is not an improbable or unreasonable one is the most that can be said of it. Quite as much could be said for several others not advanced, but which might be suggested. That the sudden impact of a draught of thirty-four cars, moving with great momentum, against another draught of like number standing still, may result in a buckling of certain of the cars, will not be disputed. That such buckling may result by throwing something in the way of an obstruction over upon an adjoining track is equally clear; but before a possible cause can be accepted by a jury as an operating cause, unless the evidence excludes all others, something in the way of direct connection with the occurrence must be shown. The destruction following the fire was so complete that every trace of the obstruction that caused the accident was effaced; nothing on the ground after the accident gave any support to the plaintiff's theory of the cause, except the fact that the trucks of car 35, the first in the series not controlled by the air brakes, were found "jammed up against the air"—that is, against the last of the air controlled series—which was a steel car. Considering the enormous energy of the explosion, they might have been jammed anywhere. The fact that they were found against the heavy steel car heavily freighted, and which had not been displaced by the concussion, is a circumstance without special significance in this connection. The whole theory advanced rests on what is assumed to be a consequence reasonably to be expected in arresting a train of 68 cars by applying the air brake to the first half of the train, and depending upon that half by its inertia to arrest the other. And even here the case fails, for upon the plaintiff's own showing, while the train was thus brought to a stop, it had been moving at a speed of only 7 or 8 miles an hour, and that on a slightly ascending grade, when the brakes were applied. So slow was the movement that one of the witnesses said he could get on or off with safety. Not only so, but whatever shock there was was so slight that it was scarcely felt by the engineer at the head of the train or the conductor at the rear. The train traveled some five or six car lengths before it was stopped under 5 or 6 pounds of reduction, whereas 55 could have been applied. If, under such conditions as these, experience shows that a buckling of the cars is to be expected, the plaintiff should have offered evidence to establish such fact. To the unexperienced the momentum under such conditions would be wholly inadequate to produce any such result. Then, too, the case supposes that from the buckling came the obstruction, with nothing in the evidence to support such view. Regarded as an

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explanation of the catastrophe, it was too conjectural to justify any finding by the jury as to what the cause actually was. Except as to the cause of an accident is ascertained, the liability of the party charged cannot be determined.

But even were we to assume that the accident occurred in the way asserted, the law of the case would be fatal to plaintiff's recovery. The negligence complained of was in the manner in which the car carrying the explosives was being transported, its position in the train, and the fact that it was not under air-brake control. The sufficiency of the car itself for the purpose for which it was used cannot be questioned, and the evidence shows that it was supplied with necessary air-braking equipment. Its position in the train, where its air equipment could not be used, because another car not similarly equipped was placed before it, was determined, not by the company, but by the conductor, whose power of direction and supervision extended this far. If it was negligence to so place it, the negligence was that of a fellow servant. To make the defendant company liable in such case, supposing the accident to have happened from this cause, some regulation or system adopted by the company requiring such arrangements of cars would have to be shown. We do not see that the doctrine of safe place or system has any application to the case. The accident did not result from defective machinery or appliance, nor was it shown that any defect existed. The plaintiff's theory is, as we have stated it, that it resulted from a negligent placing of the car containing explosives with respect to the other cars on the train, where its air-brake appliance could not be operated, and from a negligent use of the air brake, causing a buckling. Neither of these suggests a cause for which the company would be liable. In either case it would be the negligence of a fellow servant, for which no action would lie, except against the party directly in fault. There was nothing in the cause that called for a submission to the jury. From the mere fact that an accident occurred no presumption of defective appliance or defective system arises, and the evidence does not disclose either.

We have nothing in this record which calls for consideration here of Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), and known as the "Safety Appliance Act." So far as the record shows, its existence was not suggested in the court below upon the trial. The case was submitted to the jury without any reference to it, and no exception was taken. Nor was it considered by the court in entering judgment non obstante. Whatever the plaintiff's points may have been, they were withdrawn at the conclusion of the trial, and did not appear in the record. The first suggestion of the act in connection with the case, so far as

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the record shows, was in the additional exception which counsel for plaintiff asked leave to file 20 days after judgment non obstante was entered, and which was disallowed by the court. If there was error in refusing to allow the filing of this exception—we think there was none, for the obvious reason that in entering judgment non obstante the court was confined to a consideration of those things appearing in the record—such error cannot be corrected in the absence of any exception to the court's action. Without an exception to the refusal we have nothing here to review. *Patterson v. Roberts*, 109 Pa. 42. With the entry of judgment non obstante the record in the court below was complete, and by that record the case is to be judged.

The assignments of error are overruled, and the judgment affirmed.

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(Supreme Court of Indiana, May 26, 1908.)

[84 N. E. Rep. 819.]

Carriers—Passengers—Commencement of Relation.*—The relation of carrier and passenger commences where a person, with a good-faith intention of taking passage, with the consent of the carrier, express or implied, assumes a situation to avail himself of the facilities for transportation which the carrier offers.

Same.—A person, having entered upon the premises of a carrier for the purpose of taking a train, for which he purchased a ticket entitling him to transportation, was, while approaching the train upon which he was to be carried, a passenger.

Same—Personal Injuries—Common-Law Liability—Passenger Not Being Transported.†—The common-law rule which, for the purpose of determining questions of liability for injury, divided passengers into two classes, first, those being transported, and, second, those not being transported, and as to the first class exacted of the carrier the highest practical care and diligence for their safety, and in case of injury, resulting from defective roadbed, equipment, or management, a presumption of the carrier's negligence was indulged by law in favor of the injured person, and as to the second class exacted of the

*See first foot-note appended to *Karr v. Milwaukee, etc., Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623; *Illinois Cent. R. Co. v. Cotter* (Ky.), 27 R. R. R. 141, 50 Am. & Eng. R. Cas., N. S., 141.

†See second foot-note appended to *Chaffe v. Consolidated Ry. Co.* (Mass.), 27 R. R. R. 706, 50 Am. & Eng. R. Cas., N. S., 706; second foot-note appended to *O'Gara v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 333, 50 Am. & Eng. R. Cas., N. S., 333; foot-notes appended to *Cincinnati Traction Co. v. Holzenkamp* (Ohio), 25 R. R. R. 553, 48 Am. & Eng. R. Cas., N. S., 553.

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carrier the exercise of ordinary care, no presumption being indulged in favor of either party in case of accidental injury, has not been rescinded or modified in Indiana.

Same—Negligence—Management of Train.†—A railroad company is not negligent in the management of its train, rendering it liable for injuries to a passenger while approaching a train in the night-time for the purpose of being transported, where the engine by which plaintiff was struck approached the station with its headlight burning, the bell ringing, the steam shut off, running at a low rate of speed and under control, and where plaintiff was at once discovered in attempting to cross in front of the engine, the emergency brake applied, and the train stopped in the shortest possible distance.

Same—Depot Grounds—Guiding Passengers.§—A carrier is under no obligation to exercise special supervision and guidance over a passenger, a man of mature years in good health, having had considerable experience in traveling, who does not disclose the fact that he is ignorant of the situation of the tracks or station grounds, or ask for any information or guidance in going from the station to the train upon which he was to be transported and by which he was injured, though the night was dark and cloudy and the station grounds were new and uncompleted.

Same.||—And the fact that the passenger, in approaching the train which he was to board, by mistake thought that the station agent was on the opposite side of the main track on which the train was coming, and, in accordance with the agent's directions to "come on," crossed the track and was struck, did not render applicable the principle that, if guidance be furnished, it must not be negligent.

Same—Depot Grounds—Lighting—Duty.—The duty imposed upon railway companies to exercise ordinary and reasonable care for the safety of their passengers includes an obligation to keep their stations, platforms, walks, and other approaches reasonably lighted at night for a sufficient time before the arrival and at the departure of trains to enable passengers to avoid danger, and the extent of lighting required at any particular station must depend on the amount and nature of the business to be transacted, and the character, situation, and surroundings of the station with reference to tracks and other physical conditions reasonably calculated to effect the security of persons in the proper use of the premises and in the exercise of ordinary care.

†See first foot-note appended to *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487.

§See foot-note appended to *Kruger v. Omaha, etc., Ry. Co.* (Neb.), 27 R. R. R. 260, 50 Am. & Eng. R. Cas., N. S., 260; second foot-note appended to *Lane v. Choctaw, etc., R. Co.* (Okl.), 26 R. R. R. 649, 49 Am. & Eng. R. Cas., N. S., 649.

||See second foot-note appended to *Illinois Cent. R. Co. v. Cruse* (Ky.), 21 R. R. R. 145, 44 Am. & Eng. R. Cas., N. S., 145; *Merryman v. Chicago G. W. Ry. Co.* (Iowa), 27 R. R. R. 94, 50 Am. & Eng. R. Cas., N. S., 94.

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Same—Lighting Station Grounds—Questions for Jury.—The adequacy of the lighting at a railroad station is ordinarily a question for the jury under proper instructions.

Same—Contributory Negligence of Passenger.¶—A passenger, a man of mature years, in good health, having had considerable experience in traveling, asked for no information or guidance as to the method of reaching a train on which he was about to embark, though the night was dark and cloudy and the station premises new and uncompleted. He started with others from the station, but, in buttoning his coat, fell behind them, and, on hearing the station agent say, "Come on," crossed a side track, then a platform, and then passed on to the main track, erroneously believing that the agent was on the other side of the main track, and was struck by the coming train. The main track was straight for 900 feet, and the engine was equipped with a headlight which could be seen 2,000 feet, and was running not more than 6 miles an hour. The passenger at all times saw the train and its headlight, but erroneously believed that it had stopped, and stepped in front of it while not more than 7 feet away, and did not look at the engine while crossing. The engineer saw the passenger, and applied the emergency brake and stopped the train within 50 or 60 feet. Held, that the passenger was guilty of contributory negligence precluding a recovery, though it be conceded that the carrier did not perform the full measure of duty in the manner of supplying lights for its premises.

Appeal from Circuit Court, La Porte County; J. C. Richter, Judge.

Action by Jeter G. Strange against the Pere Marquette Railroad Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

See 82 N. E. 1135.

Elam & Fesler, for appellant.

Theron Miller, F. E. Osborn, and W. A. McVey, for appellee.

MONTGOMERY, J. Appellee recovered a judgment of \$10,000 against appellant for personal injuries inflicted through an alleged breach of its duty as a common carrier of passengers. The complaint is in a single paragraph, and the negligence charged against appellant was (1) in failing to light its station grounds properly; (2) in carelessly running its train of cars; and (3) in negligently failing to guide and direct appellee. Appellant answered by general denial. Errors are properly assigned upon the overruling of appellant's motion for judgment upon the answer

¶See second foot-note appended to *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487, *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457.

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of the jury to special interrogatories, and in overruling appellant's motion for a new trial.

The facts shown by the evidence are substantially as follows: That appellee was a carpenter, 28 years of age, and came from Nashville, Tenn., to Michigan City, Ind., on May 13, 1904. He had traveled considerably in his life, both by day and by night time, but had never been in Michigan City before. He reached appellant's station by means of an electric car about 11 o'clock p. m., and had with him two trunks, one tool chest, and two grips. The electric car stopped on the north side of appellant's tracks, and appellee's baggage was unloaded there. The night was windy, cloudy, and dark. The railroad station consisted of a combination passenger and baggage car, placed south of the tracks, and between the station and main track there was a switch track. The station agent used the west end of the car as an office, and the east end, separated by a partition, was used as a waiting room for passengers. The car was lighted on the inside by two lamps; and there was a signal light on the outside and on the south side of the car, which cast its rays east and west. Appellee was informed by the street car conductor that the railroad and depot grounds were new, the station unfinished, and that this car was used as a waiting room. A stranger pointed out the station car, and, leaving his baggage on the north side of the tracks, he crossed over and entered at the east end of the car. Appellee was accompanied by a companion, and their train would not be due until 1:50 a. m. He bought two tickets for St. Joseph, Mich. The agent agreed to look after the checking of the baggage, and promised to awaken appellee when his train arrived. Appellee had been traveling since noon of May 12th, and rode the night before in a day coach from Louisville, Ky., to Monon, Ind., and slept some of the way, but was tired when he reached Michigan City. The agent having promised to wake him when the train arrived, he lay down on a bench and went to sleep. When the train was approaching the agent woke him up. He spoke to his companion about the grips, and left the station car at the east end. The agent, with a white lantern in his hand, went out at the west end of the station car and went upon the platform. A stranger went out of the waiting room first, and appellee's companion next, and appellee last. Appellee knew the night was dark, and that there might be danger, but had asked no one for instructions or directions. The platform was on the south side of the main track, and between the main and side tracks, and was 110 feet long and 12 feet wide, made of planks fitted closely together and against the rails, and stood about flush with the top of the rails. The main track and the side track were ballasted with gravel and sand level with the ties. When appellee got outside the station car he stopped to button his coat, and thus dropped somewhat behind the other two men. He then saw the

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headlight upon the approaching engine, and started in a north-westerly direction toward the track. He did not see the agent's lantern, but heard a voice say: "Come up this way." The wind was blowing, and he thought the sound of the voice came from the north side of the track. He continued in the direction in which he was traveling. The engine bell was ringing, but he did not hear it or the noise of the train as it approached, or notice whether the engine had slowed up, stopped, or was moving. He saw the side track when he passed over it, and when he reached the main track he did not stop, because he heard the voice of the agent say, "Come on," and it sounded as though he was on the opposite side of the track. The train made no noise, and he thought it had stopped, and as he started to cross the track he thought the engine was no more than 7 feet distant, but perhaps it was 10 or 12 feet away. He looked at the engine before he started to cross, but did not while crossing. He was watching where he stepped, and could see the ground and rails, and when about half way across the main track he was struck by the engine and injured. The engine was equipped with an Edward's electric headlight of 2,000-candle power placed in front of a powerful reflector, and the light was burning brightly, and was such as to enable one upon the engine to see and distinguish objects from 2,000 feet to 3,000 feet away. The track west of the station was straight for 900 or 1,000 feet, and the rays of the headlight struck the track about 9 or 10 feet in front of the pilot. The engine was shut off about a mile west of the station, and was running of its own momentum, and at the rate of 5 or 6 miles an hour when appellee was struck. The engineer saw appellee step upon the track and immediately applied the emergency brake, and stopped the train within 50 or 60 feet. The station agent was at no time on north side of the track, but when he said, "Come up this way" he was on the platform, on the south side of the main track.

Appellant's motion for a new trial alleged that the verdict was not sustained by sufficient evidence, and was contrary to law, and that the court erred in denying appellant's request for a peremptory instruction.

Appellee's action is founded upon an alleged breach of duty owing to him in the character of a passenger from appellant as a common carrier. The relation of carrier and passenger commences when a person, with the good-faith intention of taking passage, with the consent of the carrier, express or implied, assumes a situation to avail himself of the facilities for transportation which the carrier offers. Appellee having entered upon appellant's premises for the purpose of taking a train in due course, and purchased a ticket entitling him to transportation between designated points, was, while approaching the train upon which he was to be carried, and by which he was injured, clearly

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a passenger. 6 Cyc. 536; Citizens' Street R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Freemont, etc., R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254; *Exton et al. v. Central R. Co.*, 63 N. J. Law, 356, 46 Atl. 1099, 56 L. R. A. 508; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227, 85 Am. Dec. 700; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Illinois C. R. Co. v. Treat*, 75 Ill. App. 340; *Young v. New York, etc., R. Co.*, 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193; *Barth v. Kansas City, etc., R. Co.*, 142 Mo. 535, 44 S. W. 778; *Warner v. Baltimore, etc., R. Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Atchison, etc., R. Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31, 114 Am. St. Rep. 462; *St. Louis S. W. Ry. Co. v. Wainwright*, 152 Fed. 624, 82 C. C. A. 16; *Lake Street, etc., R. Co. v. Burgess*, 200 Ill. 628, 66 N. E. 215; *Chicago & A. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520; *Haselton v. Portsmouth, etc., Ry. Co.*, 71 N. H. 589, 53 Atl. 1016; *McBride v. Georgia, etc., Ry. Co.*, 125 Ga. 515, 54 S. E. 674; *Shannon v. Boston, etc., R. Co.*, 78 Me. 52, 2 Atl. 678; *Gordon v. Grand St., etc., R. Co.*, 40 Barb. (N. Y.) 550; *Louisville, etc., R. Co. v. Reynolds (Ky.)* 71 S. W. 516; *Birmingham, etc. Ry. Co. v. Wise (Ala.)* 42 South. 821.

Appellant does not deny that the relation of passenger had been established before and existed at the time of the accident in which appellee was injured, but a sharp conflict is waged as to the measure of appellant's duty to him as such passenger while approaching one of its trains. The common law, for the purpose of determining questions of liability for injury, divided passengers into two classes—(1) those being transported, and (2) those not being transported. The highest practical care and diligence were exacted of the carrier for the safety of passengers of the first class, and in case of injury resulting from defective road-bed, equipment, or management a presumption of the carrier's negligence was indulged by law in favor of the injured person. The carrier was bound only for the exercise of ordinary care with respect to passengers of the second class, and in case of accidental injury no presumption as to negligence existed in favor of either party. The common-law rule has not been rescinded or modified by statute in this state. The propriety and justice of the requirement that a high degree of care be exercised for the security of passengers of the first class, and the sound public policy upon which the presumption of negligence in case of accidental injury to one of that class from defective roadway or equipment is founded, are manifest. A passenger being transported at a high rate of speed by powerful engines is helplessly in charge of the carrier; required to obey its regulations, and to rely for his safety wholly upon the foresight, care, and prudence of its agents. All of its ways, instrumentalities, and methods

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of operation are exclusively within its control, and the slightest omission or neglect with respect to any of these things is likely to be followed by frightful consequences. This court, appreciating the grounds upon which the rule was founded, has consistently held that, when an injury is sustained by a passenger in transportation upon a railroad on account of the defective condition of roadbed, equipment, or management, the happening of the accident constitutes prima facie evidence of negligence on the part of the operating company, and devolves upon it the duty of establishing such facts as will exempt it from the imputation of negligence. *Cleveland, etc., Ry. Co. v. Hadley* (Ind.) 82 N. E. 1025; *Pittsburg, etc., Ry. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312.

The special circumstances and risks attending the actual transportation of passengers do not exist with respect to passengers before entering or after leaving the coaches of such carriers. The perils surrounding a passenger while about the waiting room, platform, and station grounds of a railroad company are not different in kind from those to be encountered by persons while upon the premises of numerous manufacturing and mercantile establishments, and to which they have come by invitation or inducement for the transaction of business. That high degree of diligence and care exacted, out of considerations of public policy, for the benefit of passengers in the actual progress of their journey, is accordingly relaxed in the case of passengers who are about the stations, platforms, and approaches of a railway company. The obligation resting upon the company in supplying and maintaining these accommodations, and with respect to passengers using the same, is to exercise only ordinary care or care in proportion to the danger likely to be encountered. It is our holding, therefore, that appellant performed the full measure of its duty to appellee as a passenger in the circumstances shown, if, having regard to the nature of its business, it exercised ordinary and reasonable care for his safety and protection. *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Cincinnati, etc., R. Co. v. Peters*, 80 Ind. 163; *Pittsburg, etc., R. Co. v. Harris*, 38 Ind. App. 77, 77 N. E. 1051; *Maxfield v. Maine Central R. Co.*, 100 Me. 79, 60 Atl. 710; *Pendleton, etc., R. Co. v. Shires*, 18 Ohio St. 255; *McCormick v. Detroit, etc., R. Co.*, 141 Mich. 17, 104 N. W. 390; *Crowe v. Michigan Cent. R. Co.*, 142 Mich. 692, 106 N. W. 395; *St Louis, etc., R. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550; *Moreland v. Boston, etc., R. Co.*, 141 Mass. 31, 6 N. E. 225; *Freemont, etc., R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254; *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74; *Laffin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, 12

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N. E. 599, 60 Am. Rep. 433; Falls v. San Francisco, etc., R. Co., 97 Cal. 114, 31 Pac. 901; Conroy v. Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419; Exton v. Central R. Co., 63 N. J. Law, 356, 46 Atl. 1099, 56 L. R. A. 508; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; Batton v. South, etc., R. Co., 77 Ala. 591, 54 Am. Rep. 80; Southern Ry. Co. v. Reeves, 116 Ga. 743, 42 S. E. 1015; Robertson v. Wabash Ry. Co., 152 Mo. 382, 53 S. W. 1082; Cincinnati, etc., R. Co. v. Gibony, 100 S. W. 216, 30 Ky. Law Rep. 1005; Christie v. Chicago, etc., Ry. Co., 61 Minn. 161, 63 N. W. 482; Hayman v. Pennsylvania R. Co., 118 Pa. 508, 11 Atl. 815; Taylor v. Pennsylvania Co. (C. C.) 50 Fed. 755; Elliott on Railroads, § 1590; 6 Cyc. 608. The case of Louisville, etc., Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193, involved an accident to a passenger on account of a defect in the station platform, and this court, speaking of the duty of the company, at page 590 said; "It is bound to use the highest degree of practical care to provide against accidents to passengers that may be foreseen and prevented." This statement of the law is erroneous and disapproved in so far as it purports to define the duty of a railway company to provide and maintain instrumentalities and accommodations not directly employed in the transportation of passengers, such as platforms, waiting rooms, and appurtenances.

The complaint charged appellant with negligence in the management of its train. It was conclusively shown that the train approached the station with the headlight burning, the bell ringing, the steam shut off, running at a slow rate of speed and under control; that appellee was at once discovered on attempting to cross in front of the engine, the emergency brake applied, and the train stopped in the shortest possible distance. This charge of negligence was wholly disproved, and must be disregarded in the further consideration of the case.

It was further alleged that appellant negligently failed to guide appellee properly to his train. No facts were alleged or shown in evidence making it the duty of appellant to guide or assist appellee in reaching his train. He was a man of mature years, in good health, and in the full enjoyment of all his faculties, and had had considerable experience in traveling. The platform was situate between the waiting room and the track upon which his train would pass, and was a suitable structure for the purpose intended, and in good condition, so that no danger would be encountered in passing from the waiting room to the place provided for entering upon trains. Appellee did not disclose the fact that he was a stranger and ignorant of his surroundings, or ask for any information or guidance. In such circumstances appellant was under no obligation to exercise special supervision and guidance over appellee while traveling from the station to his train. Appellee's counsel invoke the principle that, although no assist-

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ance be exacted under the law, if any be tendered, it must not be negligently rendered. Appellant's agent, with a white light in his hand, went out upon the platform and took a position at the proper point for receiving passengers upon the train, and, as appellee approached, called out, "Come up this way," or "Come on, boys; we will get on up here," or "Come up this way, boys; here's where you will get on your train." This guidance cannot be regarded as in any wise negligent, nor can it be made so by the circumstance that appellee erroneously thought the call to him came from the north side of the track, and was thereby induced to make an attempt to cross in front of the engine.

The most serious charge of negligence preferred against appellant is in failing to light adequately its station grounds. The duty imposed upon railway companies to exercise ordinary and reasonable care for the safety of their passengers includes an obligation to keep their stations, platforms, walks, and other approaches reasonably lighted at night for a sufficient time before the arrival and after the departure of trains to enable passengers to avoid danger. *Louisville, etc., Ry. Co. et al. v. Treadway*, 142 Ind. 475, 40 N. E. 807, 41 N. E. 774; *Louisville, etc., Ry. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Abbot v. Oregon R. Co.*, 46 Or. 549, 80 Pac. 1012, 1 L. R. A. (N. S.) 851, 114 Am. St. Rep. 885; *Gerhart v. Wabash Ry. Co.*, 110 Mo. App. 105, 84 S. W. 100; *Alabama, etc., R. Co. v. Arnold*, 84 Ala. 159, 4 South. 359, 5 Am. Rep. 354; *Ellis v. Chicago, etc., Ry. Co.*, 120 Wis. 645, 98 N. W. 942; *Heinlein v. Boston, etc., R. Co.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304; *Illinois Cent. R. Co. v. Cruse*, 96 S. W. 821, 29 Ky. Law Rep. 914, 8 L. R. A. (N. S.) 299; *Atchison, etc., R. Co. v. Calhoun*, 18 Okl. 75, 89 Pac. 207; *Elliott on Railroads* (2d Ed.) § 1590a; *Thompson on Negligence*, § 2391; *Hutchinson on Carriers*, (2d Ed.) § 516; 6 Cyc. 609. The extent of lighting required under the law at any particular station must depend upon the amount and nature of the business to be transacted, and the character, situation, and surroundings of the station with reference to tracks and other physical conditions reasonably calculated to affect the security of persons in the proper use of the premises and in the exercise of ordinary care. The adequacy of the lighting is ordinarily a question for the jury under proper instructions; and, if appellee's injury was the result of a fall from the unguarded edge of an elevated platform, or over an obstruction in his path, or on account of a hole into which he stepped because of the darkness, the general verdict of the jury finding, in effect, that appellant's premises were insufficiently lighted, and that appellee had used ordinary care for his own safety, would doubtless be conclusive. But the manner and circumstances of this accident are so unusual that, accepting as true the statement of facts most

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favorable to appellee, but one conclusion can be reasonably drawn therefrom by impartial minds, and that is that he was not in the exercise of ordinary care for his own safety when injured.

Conceding that appellant did not perform the full measure of its duty to the traveling public in the matter of supplying lights for its premises and taking conditions as they were, we are clearly of opinion that appellee's injury must be attributed, in part at least, to his lack of attention and indifference to his surroundings. He was a stranger, and unacquainted with the station grounds, but he did not disclose that fact or seek information. The station platform was low, 12 feet wide and 110 feet long, situated between the waiting room and the main track in such a position as to require appellee to pass over it in going to his train and to expose him to no danger. The agent walked ahead with a white lantern, and called out, "Come up this way," in a tone of voice which all heard. Appellee, falling behind the other passengers, says that he did not see the lantern and misunderstood the direction whence the voice came, but this mistake was his, and he must bear the consequence. He was told that his train was coming, and, going outside, he saw the headlight when probably 200 or 300 feet away. He traveled 25 or 30 feet in a northwesterly direction half facing the approaching train, and looked at the light again when it was 10 or 12 feet distant. He erroneously thought the train had stopped, and attempted to cross the main track directly in front of the engine. His ignorance of the premises, the absence of general lighting and the attendant darkness imposed upon him the duty of exercising greater vigil for his own safety. The absence of platform lights was not the sole cause of the accident, since the instrument with which he collided was distinctly visible at all times. He knew where the engine was, and its powerful headlight so lighted up his path as to enable him to know when he stepped upon the main track, and to see and distinguish the rails and ties, and to enable the engineer to see him. Appellee was a man of mature years and in full possession of his faculties, and it could hardly be anticipated that such a person either in the daytime or at night would pass over the platform and walk immediately in front of the train which he desired to board. An affirmance of a recovery upon these facts would relieve and excuse passengers of any concern and care for their own safety, and would exact of the carrier, not only the highest possible care, but an absolute insurance of the security, of persons rightfully upon its premises. Our conclusion is that appellee is shown by the evidence to have been guilty of contributory negligence, which precludes a recovery. *Wabash, etc., R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521; *Smith v. Wabash, etc., R. Co.*, 141 Ind. 92, 40 N. E. 270; *Cincinnati, etc., R. Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593, 19 Am. St. Rep. 96; *Chicago, etc., R. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Ohio*,

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etc., R. Co. v. Hill, 117 Ind. 56, 18 N. E. 461; Indiana, etc., R. Co. v. Green, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; Chicago, etc., R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801; Cincinnati, etc., R. Co. v. Butler, 103 Ind. 31, 2 N. E. 138; Bellefontaine, etc., R. Co. v. Hunter, 33 Ind. 335, 5 Am. Rep. 201; Bancroft v. Boston, etc., R. Co., 97 Mass. 275; Young v. Old Colony R. Co., 156 Mass. 178, 30 N. E. 560; Judge v. Elkins *et al.*, 183 Mass. 230, 66 N. E. 708; Adams v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 105 S. W. 526; Weeks v. New Orleans, etc., R. Co., 40 L. Ann. 800, 5 South, 72, 8 Am. St. Rep. 560.

We have considered appellant's motion for judgment upon the answers of the jury to special interrogatories, notwithstanding the general verdict, but are of opinion that such answers are not sufficiently full and conclusive to overthrow the general verdict, and therefore have determined the appeal upon the evidence.

The judgment is reversed, with directions to sustain appellant's motion for a new trial.

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(Supreme Court of South Carolina, July 6, 1908.)

[61 S. E. Rep. 900.]

Carriers—Carriage of Passengers—Personal Injuries—Evidence—Negligence.*—In an action by a passenger for injuries sustained while riding on a caboose, the fact that it was derailed while riding thereon would, at most, be only presumptive evidence of some negligent act or omission by the carrier.

Same—Willful Negligence.—In an action for the death of a passenger while riding on a caboose cab, the evidence held not to show any willful misconduct or neglect by the carrier which caused decedent's death.

Appeal and Error—Review—Verdict—Against Evidence.—In an action against a railroad company for the death of a passenger, alleged to have been caused by willful negligence of defendant, where the evidence did not show any willful misconduct by the company, a judgment for plaintiff will be set aside on appeal.

Carriers—Passengers—Personal Injuries—Proximate Cause—Instructions.—In an action for the death of a passenger while riding on

*See foot-note appended to Cincinnati Traction Co. v. Holzenkamp (Ohio), 25 R. R. R. 553, 48 Am. & Eng. R. Cas., N. S., 553, foot-notes appended to Enos v. Rhode Island Sub. Ry. Co. (R. I.), 24 R. R. R. 612, 47 Am. & Eng. R. Cas., N. S., 612; foot-note appended to Pennsylvania R. Co. v. McCaffrey (C. C. A.), 23 R. R. R. 23, 46 Am. & Eng. R. Cas., N. S., 23; McCord v. Atlanta, etc., R. Co. (N. Car.), 10 R. R. R. 275, 33 Am. & Eng. R. Cas., N. S., 275.

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a caboose car in defendant's train, the court refused instructions requested by defendant that it was negligence per se for a passenger to ride on top of a caboose car, except in an emergency requiring it, where there was a regular passenger car provided, and if a passenger goes into a passenger coach and afterwards leaves such car and goes on the top of a caboose car, a place of obvious danger, and not intended for passengers, and is injured by reason of his being on such car, and if his riding on top of the caboose car caused or contributed to his injury as a proximate cause, and his injury would not have occurred had he been in the car provided for passengers, he is guilty of contributory negligence as a matter of law, and cannot recover. Held, that the requested instructions did not assume any issuable fact and left to the jury whether decedent's going on top of the caboose contributed proximately to his death, and their refusal was error.

Same—Contributory Negligence.†—If a passenger, in the absence of an emergency requiring it, rides in a place of obvious danger which he knows, or by the exercise of ordinary care should know, is not provided for passengers, and such act contributes proximately to his injury, he is guilty of contributory negligence and cannot recover.

Trial—Taking Case from Jury—Uncontroverted Evidence—Direction of Verdict.—All questions or issues of fact are for the jury, but when the facts on which the case must turn are undisputed, or so conclusively established that they admit of but one inference, the question is one of law, and the court should direct the jury as to the proper conclusion.

Carriers—Carriage of Passengers—Injuries to Passenger—Negligence of Passenger.—In an action for death of a passenger while riding on top of a caboose car, even if the passenger left the coach and went on top of the caboose at the suggestion of a brakeman, and the conductor saw him there while the train was stopped at a station, the passenger was guilty of gross negligence in remaining on top of the car after the train started out, and in riding thereon, since the danger of riding on a caboose car is so obvious that a prudent man should not take the risk, unless some reasonable necessity compels it.

Same—Duty of Passenger—Exercise of Care.‡—The duty of a carrier of passengers demands the exercise of the highest degree of

†See first foot-note appended to *Miller v. Atlanta, etc., Ry. Co.* (N. Car.), 25 R. R. R. 159, 48 Am. & Eng. R. Cas., N. S., 159.

‡For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see first foot-note appended to *St. Louis, etc., Ry. Co. v. Green* (Ark.), 27 R. R. R. 671, 50 Am. & Eng. R. Cas., N. S., 671; foot-notes appended to *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; foot-notes appended to *Valente v. Sierra Ry. Co.* (Cal.), 26 R. R. R. 676, 49 Am. & Eng. R. Cas., N. S., 676; foot-notes appended to *Magee v. New York, etc., R. Co.* (Mass.), 26 R. R. R. 221, 49 Am. & Eng. R. Cas., N. S., 221.

For the authorities in this series on the subject of the degree of care required of a passenger for his own protection, see foot-notes appended to *Pomeroy v. Bangor, etc., R. Co.* (Me.), 27 R. R. R. 123, 50

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care for the safety of passengers, but a corresponding duty is on the passenger to exercise at least ordinary care for his own safety.

Negligence—Contributory Negligence—Comparative Negligence.§—The doctrine of comparative negligence not being recognized in South Carolina, to defeat a recovery in an action for negligence, it is only necessary to show some negligence by plaintiff directly contributing, as a proximate cause, to the injury, and without which it would not have happened.

Carriers—Carriage of Passengers—Injury to Passenger—Contributory Negligence.—In an action for the death of a passenger while riding on a caboose car, evidence held to show that decedent's negligence contributed as a proximate cause to his death, so as to bar a recovery.

Negligence—Proximate Cause.—It is not necessary, in order to render the negligence of a person the proximate cause of an injury, that he be guilty of some active, affirmative negligence; passive negligence being sufficient if it is the direct cause of the injury.

Appeal from Common Pleas Circuit Court of Darlington County; R. W. Memminger, Judge.

Action by Agnes B. McLean, as administratrix of the estate of William G. McLean, deceased, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Willcox & Willcox, Henry E. Davis, J. T. Barron, and W. F. Dargan, for appellant.

Edward McIver, W. P. Pollock, and Spears & Dennis, for respondent.

JONES, J. The plaintiff, as administratrix, brought this action to recover damages for the death of William McLean, caused by the derailling of a caboose car on top of which he was riding, alleged to have been the result of defendant's negligent and willful conduct. The trial resulted in a verdict and judgment for \$10,000 in favor of the plaintiff. The defendant has appealed to this court upon 42 exceptions, with numerous subdivisions. We deem it unnecessary to consider the exceptions in detail, but will direct attention to the pivotal and controlling questions.

1. Was there any evidence tending to show that McLean's

Am. & Eng. R. Cas., N. S., 123; *Karr v. Milwaukee, etc., Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623; foot-notes appended to *Miller v. Atlanta, etc., Ry. Co.* (N. Car.), 25 R. R. R. 159, 48 Am. & Eng. R. Cas., N. S., 159.

§For the authorities in this series on the subject of comparative negligence, see foot-notes appended to *Weaver v. Pennsylvania R. Co.* (Pa.), 21 R. R. R. 749, 44 Am. & Eng. R. Cas., N. S., 749; *Rietveld v. Wabash R. Co.* (Iowa), 19 R. R. R. 181, 42 Am. & Eng. R. Cas., N. S., 181.

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death was the result of any wanton or willful act or omission on the part of the defendant?

It appeared that on August 11, 1904, William G. McLean, with 9 or 10 other young men, boarded the defendant's train at Darlington, S. C., with a block ticket for the party from that point to McColl, S. C., where they were going to play baseball. The train was a freight train, but there was also a passenger coach attached, and at the rear end of the train there was a four-wheeled caboose. There were 25 passengers, including 3 infants, and the seating capacity of the coach was sufficient for 24 grown persons. Just after the train left Darlington, conductor York began taking up the tickets, beginning in the passenger coach. On entering the caboose car, he found several passengers in there, among them D. T. McKeithan, J. W. Moore, and 4 or 5 of the baseball men, including William G. McLean. The conductor testified that he told the men in the caboose car that said car was not for passengers and requested them to go into the passenger coach. This was corroborated by the testimony of McKeithan, Moore, and Scarborough, one of the train hands. Fred Stem testified that he went into the caboose with the conductor, pointed out the men in there entitled to ride on the block ticket, and returned to the passenger coach, and that he did not hear the conductor make such statement. J. W. Willcox testified that he was in the caboose car and did not hear the statement. Later McKeithan and Moore and some of the young men went into the passenger coach. There can be no reasonable doubt that such a statement was made by the conductor, and at the same time it may be conceded that Stem and Willcox did not hear it. Whether the unfortunate McLean heard it, will never be known with certainty. There can be no reasonable doubt that the conductor intended that all present should hear the statement, and the fact that said statement was made and was acted on by some present must be kept in mind, in judging whether the after conduct of the conductor indicated any wanton or willful disregard of duty. The conductor returned to the front end of the passenger coach, where he kept his bill box and papers. At Mont Clair, a station about seven miles from Darlington, McLean and Smith climbed up on top of the caboose by means of a ladder at the rear end. After the train passed Mont Clair, and before reaching Lumber, which is about 10 miles from Mont Clair, J. W. Willcox climbed upon the cab and found McLean and Smith up there, and he sat with them upon the cupola of the cab. Mr. Willcox stated that he went up there because it was sultry and hot in the caboose, that before going he asked a brakeman on the caboose to open the window of the cupola, that he was informed that the window was nailed or tight and could not be raised, and that brakeman suggested that it was cooler on top and that he go up there. This is all the evidence to support the allegation that McLean was in-

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vited by defendant's agents to ride on top of the caboose, and the testimony as to the suggestion of the brakeman was taken subject to the objection that a mere brakeman has no authority whatever, real or apparent, to invite a passenger to ride on top of the caboose. There was not a particle of evidence that the conductor was aware that these young men were riding on top of the caboose from Darlington to Lumber. The train stopped for about one-half an hour at Lumber, shifting, etc. During this stop these young men ate some watermelon on top of the cab and engaged in sport with others on the ground, throwing the rinds at each other. After this, according to Willcox's testimony, Smith went down, and Fred Stem went on top of the caboose. Stem said he went up after the train had stopped at Lumber about 30 minutes and found Willcox and McLean there. Willcox could not state positively whether McLean went down from the cab during the stay at Lumber, but the uncontradicted testimony of J. W. Moore makes it certain that he did. Moore testified that while at Lumber, McLean came down into the passenger coach and sat with him for a few minutes on the seat vacated by McKeithan, who got off at Lumber, his destination; that he had some watermelon rind in his hair and brushed it out, seemed warm and fanned himself a while, and got up and disappeared; that he did not see him any more until after the wreck. McLean therefore, having a seat in the passenger coach, voluntarily left it and went up on top of the caboose. The complaint alleged that: "Plaintiff's intestate and others were seen by the conductor and other agents of the defendant company to be riding on top of the caboose and were not warned of any danger thereon." The only evidence offered to establish this is fairly represented by the following from the testimony of J. W. Willcox: "Q. When you got to Lumber, did the train stop any considerable length of time? A. It stopped about half an hour, and did some shifting in the yard. Q. Did you at any time see the conductor? A. Yes, he was walking around there. Q. Did he see you? A. He should have seen me. Q. Could he see whether there was anybody on the caboose or not? A. He could see. Q. Did he see? A. He should have seen. We were in a conspicuous place. Q. Was there any remark made to him by any one up there while you were at Lumber? A. We bought some watermelons, and we were eating watermelons, and I think some of the boys, in a guying way, asked the captain if he would have a piece. Q. Did he, when that remark was made to him, look up there. A. He looked in that direction. Q. Did he answer? A. I couldn't say. He was a good distance off."

The conductor testified that he was busy with duties at the station and was not aware that any of these young men were on the caboose until at the time of the wreck; but, conceding that the conductor actually saw these young men on top of the caboose while it was at rest at Lumber and detached from the engine,

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that fact would not tend to show that he had reason to believe they would remain and ride on top of the caboose. He had already informed passengers in the presence of McLean that it was against rules for passengers to ride inside the caboose. While the caboose was at rest and detached from the engine, there was no real danger in going on top and eating watermelons there. For that matter, they could have chased each other over the bumpers or under the cars without danger if the shifting engine was not about to connect. The hazard was not in being on top of the caboose while it was detached and at rest, but in daring to ride upon it, and there was no evidence that the conductor knew that they had ridden or intended to ride there. On the contrary, the only reasonable inference to be drawn from the testimony is that the conductor, in view of the notice he had already given that the caboose was not to be occupied by passengers, had reason to believe that no one would be so reckless as to remain and ride on its top. Further, with respect to the question whether the defendant, through its agents, willfully failed to warn the plaintiff's intestate not to ride on the caboose, there was testimony by J. W. Moore, without direct contradiction, to the effect that, while the train was at Lumber, a few minutes before its departure, he heard some of the train crew say to some one on top of the train: "You better come inside. The white folks don't allow you to ride up there." Willcox and Stem testified, however, that they heard no such warning.

When the train left Lumber, it was some 30 minutes late. The track between Lumber and Robbins Neck was straight and slightly downgrade. McLean, Willcox, and Stem were sitting on the cupola of the caboose. There is nothing in the testimony from which it could be reasonably inferred that the speed of the train was reckless, or that it exceeded the schedule speed of 30 miles an hour allowed by the rules of the company, and there was no attempt made to show that such rule was unreasonable. In these days a high rate of speed may be perfectly consistent with due care in the management of a freight train. For the purpose of the point under consideration, it may be conceded that there was a scintilla of evidence tending to show a high and rapid rate of speed. It may have so appeared to some passengers, and especially to those riding on top of the caboose, who were necessarily subjected to the jerky motions of a freight train. Conceding even that there was evidence tending to show a negligent rate of speed, still their failure to show such a speed as indicated a wanton and willful disregard of duty for negligence and willfulness indicate opposite states of the mind. When the accident happened, the engineer had blown the signal for Robbins Neck, a flag station about three

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miles from Lumber. Suddenly the cab was derailed, broke loose from the passenger coach, and turned over down a slight embankment, precipitating McLean, Willcox, and Stem to the ground and so injuring McLean that he died two days thereafter. The acts of wantonness alleged to have caused the injury and death are thus summarized in the seventh paragraph of the complaint: "(7) That said car was derailed and wrecked as aforesaid, by the negligence, carelessness, recklessness, and wantonness of the defendant company and its agents, servants, and employees, acting in the scope of their agency and duties: (a) In providing unsafe, unsuitable, and unfit cars on their said train on said occasion; (b) in attaching to the rear of its said train the light, short, and small car or caboose, which was unfit and unsafe for such use; (c) in attaching to the rear of its train a car not provided with sufficient trucks or wheels, and which was too light and short for such use, and which was unfit and unsafe for passengers to ride in; (d) in running said train as constructed, at a high and excessive rate of speed; (e) in allowing, permitting, encouraging, and inviting passengers to ride in said unsafe, unfit, and improper car or caboose and in unsafe and dangerous places on their said train of cars, and in failing to warn them of danger; (f) in failing to have heavy, strong rails properly and securely fastened together; (g) in failing to have sufficient, sound, and secure cross-ties to give necessary support to the track; (h) in that the flanges of the wheels of the cars were defective, worn out, and unsafe on said occasion." There was no attempt to prove specifications "f," "g," and "h." We have already considered specifications "d," and "e." It remains to consider whether there was evidence tending to show willfulness in the respects charged in specifications "a," "b," and "c."

The fact that the cab was derailed would at most be only presumptive evidence of some negligent act or omission, with respect to the track, the car, or the management. The evidence makes it manifest that there was no willful disregard of a passenger's right to use the cab in question. It had been inspected just before its use on the occasion in question and found to be in good condition. Four-wheeled cabooses had been in use by the defendant company. Two of the plaintiff's witnesses thought it was an unsafe model for a high rate of speed; but, on the other hand, there was testimony from experts that the car was especially fitted for freight service, and that it was a standard on 12 to 14 railroads in the country, including the Pennsylvania System. The cab was not intended for the use of passengers, and, as shown, the conductor impressed that fact upon passengers when he first became aware that they desired to ride therein. There was no evidence showing such

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frequent derailment of four-wheeled cabooses, as distinguished from other patterns, as to warrant defendant in being charged with recklessness in their continued use. After a painstaking review of the record, we fail to find the slightest evidence tending to show any willful misconduct of defendant causing the death of plaintiff's intestate, and it is our duty to set the judgment aside for error in submitting such issue to the jury and in permitting a verdict to stand based upon such a conclusion.

2. We next consider the question of contributory negligence.

The court refused to give the jury the following instructions, as requested by defendant's counsel:

"It is negligence per se for a passenger to ride on top of a caboose car, except in an emergency requiring it, and if his act in so doing causes his injury, or contributes thereto as a proximate cause, he cannot recover.

"It is negligence per se for a passenger to ride on top of a caboose car when there is a regular passenger car provided for passengers, and if the passenger's riding on top of the caboose car causes his injury, or contributes thereto as a proximate cause, he cannot recover.

"If a passenger goes into a car provided for passengers and afterwards leaves such car and goes in and upon the top of a caboose car, a place of obvious danger to any man in his senses, and not intended for passengers, and he is injured by reason of his being on top of said car, which injury would not have occurred had he been in the car provided for passengers, he is guilty of negligence or contributory negligence, as a matter of law, and cannot recover."

These requests do not assume as a fact any matter in issue, and left to the jury to determine whether McLean's riding on top of the caboose contributed to his death as a proximate and concurring cause, and the principle of law contended for by them was not placed before the jury in the instructions given. We think it was error to refuse the request. The authorities generally hold that, if a passenger, without an emergency excusing it, rides in a place of obvious danger, which he knows, or by the exercise of ordinary care ought to know, is not provided for passengers, and such act contributes as a proximate cause to his injury, he is guilty of contributory negligence and cannot recover. *Pennsylvania, etc., R. R. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 657; *Houston, etc., R. R. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799; *Bon v. Railway, etc.*, 56 Iowa, 664, 10 N. W. 225, 41 Am. Rep. 127; *Kentucky, etc., R. R. v. Thomas' Adm'r*, 79 Ky. 160, 42 Am. Rep. 209; *Little Rock, etc., R. R. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Florida, etc., Ry. v. Hirst*, 30 Fla. 1, 11 South. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; *Patterson v. Central, etc., R. R.*, 85 Ga. 653, 11 S. E. 873; *Ashbury v. Charlotte, etc., Ry.*, 125 N. C. 568, 34

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S. E. 657; Railroad v. Jones, 95 U. S. 439, 24 L. Ed. 506; Id., 61 Am. St. Rep. 90, note; 4 Elliott on Railroads, § 1632; Cyc. 652, 5 Encyc. Law (2d Ed.) 674. This view does not at all conflict with Zemp v. Railroad, 9 Rich. Law, 84, 64 Am. Dec. 763, which held that under the circumstances of that case the question of contributory negligence was for the jury. Zemp, when injured, was standing on the platform of the passenger coach without knowledge that it was a prohibited place. The train had stopped at a point where the stages had been in the habit of taking up passengers. The conductor left the cars to inquire whether they should stop there as heretofore, or proceed further. The passengers, seeing one stage coach and persons and horses in the woods at this point, supposed that they had gone as far as they could on the railroad. Many arose from their seats, and several got on the platforms, amongst the rest the plaintiff, who got on the rear platform of the forward car. The halt was but for a few minutes, and, as the conductor ordered the train to proceed, the plaintiff stepped on the forward platform of the hindmost car. In a few moments the engine, tender, and baggage car were derailed, due to negligent construction of the track. The passenger cars were jammed together, and the body of Zemp was caught in the wreck of the two platforms. It will be observed that Zemp went upon the platform while the car was at rest, for the purpose of disembarking at the usual stopping place. His standing there for a few moments after the car suddenly moved forward, having no knowledge that it was a prohibited place, could not be held contributory negligence as matter of law.

In connection with the foregoing, we will consider the question whether there was error in refusing to direct a verdict on the ground that the only conclusion of which the evidence is susceptible is that plaintiff's intestate was guilty of contributory negligence. All questions or issues of fact are for the jury; but when the facts upon which the case must turn are undisputed or conclusively established, and they admit of but one inference, the question is one of law, since there is no issue of fact, and the court not only may, but when requested must, direct the jury as to the proper conclusion. Jarrell v. Railroad Co., 58 S. C. 495, 36 S. E. 910; Lyon v. Railway, 77 S. C. 344, 58 S. E. 12. The plaintiff's intestate was the graduate of a college and a very intelligent and energetic young man. Having a seat in the passenger coach, he left the same without excuse or necessity, and went on top of a freight cab and rode there until precipitated therefrom to his death. If it be conceded that he went upon the cab at the suggestion of a mere brakeman, of which there is no evidence, and it be conceded that the conductor saw him while eating watermelon on top of the detached caboose during the long stop at Lumber—a fact positively de-

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nied by the conductor and sought to be established by showing that he could have seen him had his attention been directed to that end—still the plaintiff's intestate was guilty of gross negligence in remaining on top of the car and riding thereon. To ride thus on a freight cab is a danger so obvious that a prudent man should not take the hazard unless some reasonable necessity compels. There was no emergency in this case, and he took the risk from motives of pleasure. Neither the suggestion of a mere brakeman to go there nor the failure of the conductor to warn if he saw him there engaged in sport while the car was at rest and detached can excuse the negligence of the passenger in remaining and riding in a place not provided for passengers and of such obvious danger.

The cases cited above show that such is and ought to be the law. The duty of a carrier of passengers demands that he exercise the highest degree of care for the safety of passengers, but there is a corresponding duty on the part of the passenger to exercise at least ordinary care for his own safety. Without this co-operation on the part of the passenger, the carrier can never carry out efficiently the rules provided for safety. The rules of the defendant company forbade a passenger's riding even inside the cab, and the conductor made a reasonable effort to notify passengers of it and to enforce it. If the unfortunate McLean, though present, failed to hear the warning, of which there is no evidence, still it was manifestly hazardous for him to ride on top of the cab, where no reasonable man contemplates that a passenger will ride, except in a great emergency, that this act must be held negligent. In this state where the doctrine of comparative negligence is not recognized, and where it is only necessary, in order to defeat a recovery, to show some negligence of plaintiff directly contributing a proximate cause to the jury, and without which it would not have happened, we are bound to hold, upon the most favorable view of the testimony in behalf of plaintiff, that her intestate's negligence contributed as a proximate cause to his injury. The undisputed testimony is that no one in the passenger coach received the slightest injury, as that car was in no wise affected by the derailment of the cab. So far as the evidence shows, no one was injured except those riding on top of the caboose. Hence it is manifest that, if plaintiff's intestate had occupied the passenger coach, where he should have been, he would not have been injured.

It is contended that to make the negligence of a person a proximate cause he must do something, and that just passively though negligently being where the stroke fell cannot be a proximate cause. as by way of illustration, in *Hunter's Case*, 72 S. C. 336, 51 S. E. 860, 110 Am. St. Rep. 605, the passenger walked off the moving train, in *Jarrell's Case*, 58 S. C. 491, 36 S. E.

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910, the passenger stepped off a train standing over a trestle, and in Lyon's Case, 77 S. C. 328, 58 S. E. 12, the employee was uncoupling a car in a negligent and dangerous manner. This contention cannot be sustained. In Sanders v. Manufacturing Co., 71 S. C. 63, 50 S. E. 680, the court declared: "An attempt to make a line of separation between positive and negative negligence—between active negligence and lack of vigilance—would involve the courts in distinctions not only difficult and intricate, but highly artificial and unsound." An examination of the cases which hold a passenger guilty of contributory negligence by riding in an exposed and prohibited place will show that the passenger's negligence placed him in a position in which the negligence of the carrier, operating in connection with the negligent position of the passenger, produced the injury. This is not a case in which the negligence of the passenger was a remote cause in the chain of causation or a mere condition upon which the carrier's negligence operated as an efficient cause, but is a case in which the negligence of a passenger (riding in an exposed and prohibited place) operated directly and concurrently with the negligence of the carrier, and without which the injury would not have happened.

These views render it unnecessary to further consider the exceptions.

The judgment of the circuit court is reversed.

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(Supreme Court of Kansas, July 5, 1907. On Rehearing, May 9, 1908. On Further Rehearing, July 3, 1908.)

[96 Pac. Rep. 1007.]

Carriers—Injury to Passenger—Limitation of Liability—Construction and Effect.*—Where an express company contracts with the railway company, by means of whose trains it carries on its business, that it assumes all risk of injury to its employees, and undertakes to save the railway company harmless from any claims with respect thereto, and contracts with one of its employees that neither it nor the railway company shall be liable to him for any injury occurring to him while traveling on any of such trains in the course of

*See foot-note appended to Long v. Lehigh Valley R. Co. (C. C. A.), 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508, where all the authorities on the subject in this series preceding it are collected; foot-note appended to Robinson v. St. Johnsbury, etc., R. Co. (Vt.), 24 R. R. R. 630, 47 Am. & Eng. R. Cas., N. S., 630; Davis v. Chesapeake & O. Ry. Co. (Ky.), 24 R. R. R. 170, 47 Am. & Eng. R. Cas., N. S., 170; first foot-note appended to Stone v. Union Pac. R. Co. (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119.

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such employment, such employee cannot maintain an action for injuries received while so traveling, in consequence of the negligence of the agents of the railway company.

Death—Right of Action.†—Where one has made a valid contract, which would prevent him from maintaining an action in his own behalf on account of an injury received through the negligence of another, if his death results in consequence of such injury, no action can be maintained therefor, in behalf of his widow or next of kin, under the statute (Gen. St. 1901, § 4871), which gives an action for wrongful death if the decedent might have maintained one if he had lived.

Johnston, C. J., and Smith and Graves, JJ., dissenting.

On Rehearing.

Carriers—Injuries to Passenger—Limitations.—In view of the Kansas statutes making a railroad company liable for all damages done to persons or property in consequence of any neglect on its part (section 5857, Gen. St. 1901), and for all damages done to any of its employees in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees (section 5858, Id.), although an express company contracts with the railway company, by means of whose trains it carries on its business, that it assumes all risk of injury to its employees, and undertakes to save the railway company harmless from any claims with respect thereto, and contracts with one of its employees that neither it nor the railway company shall be liable to him for any injury occurring to him while traveling on any of such trains in the course of such employment, such employee may still maintain an action against the railway company for injuries received while so traveling, in consequence of the negligence of its agents.

Burch, Mason, and Porter, JJ., dissenting.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; W. G. Holt, Judge.

Action by Emma M. Sewell against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

S. F. & S. D. Hutchings, McFadden & Morris, and Ashley, Gilbert & Dunn, for plaintiff in error.

W. R. Smith, A. A. Hurd, and Angevine & Cubbison, for defendant in error.

MASON, J. Jefferson D. Sewell, a messenger of the Wells-Fargo Express Company, while engaged in that service, was killed in a wreck on the road of the Atchison, Topeka & Santa

†See *Hill v. Pennsylvania R. Co.* (Pa.), 8 Am. & Eng. R. Cas., N. S., 229; foot-note appended to *Adams v. Northern Pac. Ry. Co.* (Wash.), 15 Am. & Eng. R. Cas., N. S., 784.

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Fe Railway Company. His widow, Emma M. Sewell, brought an action against the railway company alleging that its negligence caused the death. The case was submitted upon an agreed statement of facts, from which it appeared that the express company and the railway company had entered into a contract, by which the former assumed all risk of injury to its employees, and agreed to hold the latter harmless from all loss, cost, and damage arising therefrom, and that Sewell had executed a contract with the express company, which included a provision that neither it, nor any railway company on whose line he might travel in the course of his employment, should under any circumstances be liable for any injury occurring to him while so traveling. The district court held that the defendant was not liable, and gave judgment accordingly, from which the plaintiff prosecutes error.

Two questions are presented: First, were the contracts referred to effective to relieve the railway company from liability to Sewell for any injury received by him, occasioned by the negligence of its agents, while he was engaged in his work upon one of its trains? and, second, if so, did this waiver of any claim upon his own behalf take away the right of his heirs to recover in the event of his death as the result of such an injury? It was of course competent for the messenger, as between himself and the express company, to assume any risks of his employment resulting from the negligence of the railway company. The question involved is whether he could contract away his right to compensation for the results of such negligence, as between himself and the railway company, with which he was brought into privity through its contract for indemnity with the express company. It has often been stated as a general principle that no contract will relieve a common carrier from liability for the consequences of the negligence of its agents to one who is a passenger for compensation. 6 Cyc. 578. There is abundance of authority that an express messenger is a passenger (6 Cyc. 543, note 47); and, as he is present upon the train in pursuance of an agreement from which the railway company receives a financial benefit, he is essentially a passenger for hire (note, 61 Am. St. Rep. 98). This consideration is sometimes spoken of as controlling upon the question of the power to waive claims for damages caused by negligence; but, while language to that effect may be appropriate to some situations, it is not so to that here presented. He is a passenger in the sense that he is neither a mere licensee, a trespasser, nor an employee of the railroad company, but one who, through his employer, the express company, has bargained for the privilege of riding upon the train. He is not a passenger in the sense that his primary object in so doing was to be conveyed from one point to another. The definitions that have been given of the

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word "passenger" are nearly as numerous as the different occasions that have arisen to state its meaning. See 6 Words and Phrases Judicially Defined, 5218. It is not necessary that a definition of universal application should be framed. The important question is whether one, in the situation of Sewell, could make a valid contract releasing the railroad from liability for the results of its ordinary negligence. Or, to state it in the form of a definition, whether he was a passenger within the meaning of the rule that a passenger cannot make such a contract.

The most complete discussion of the very matter here involved to be found in the books is that supporting the decision in *B. & O. S. W. Ry. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, where a conclusion is reached in accordance with the judgment of the trial court in this case. If the judgment is to be affirmed, it must be upon the theory adopted by the federal Supreme Court, and for the reasons adduced in the opinion written by Justice Shiras, from which Justice Harlan alone dissented. In that opinion the question whether the messenger is properly to be described as a passenger is not treated as necessarily decisive. The argument may be thus summarized: Ordinarily persons may make such contracts as they see fit, and the courts are required to give them effect. A common carrier, however, in virtue of its character as such, is under partial disability in this regard. The law imposes upon it certain obligations of which it can divest itself by special contract only when such contract is one which the courts will regard as fair under all the circumstances. Ordinarily it is not fair that a common carrier should be permitted to absolve itself by contract from the consequences of its own negligence in the carriage of either goods or of passengers; and so, ordinarily, such a contract will be held void. But the reason why such a contract is held unconscionable, and therefore unenforceable, is that the common carrier, when acting in that capacity, does not deal on equal footing with its customer. He has the right to require it to serve him, and to do so upon terms of equality with other customers. He really invokes this right whenever he makes a shipment of goods, or offers himself as a passenger in the usual course of business, notwithstanding that he may be granted some nominal or even substantial concession, such as a reduction from the schedule charge. He is in no position to drive a bargain. He requires and must have the services of the carrier. He must take them upon such terms as it offers. And if in such circumstances he assents that he will bear his own risk of loss or injury resulting from its negligence, the agreement will be regarded as, in effect, extorted from him, and ineffectual to bind him. But in relation to the carriage of express matter, railroad companies do not act as in ordinary cases. As to such traffic, the services they perform are not done as public carriers, but

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under a private contract. They are not bound to undertake such business at all. They do not hold themselves out to the public as engaged in that business. And while, in fact, they do generally or universally undertake it, they do so in virtue of special contracts, which are entered into by them with only a few organizations throughout the entire country, and ordinarily with but one of them over the same route. A contract made between a railway company and an express company under such circumstances requires no supervision by the courts, and their interference with it would be unjustifiable. The shipper is as able as the carrier to protect its own interests, and to resist the imposition of any inequitable conditions. The agreement therefore must be upheld. The express company, having effected a valid assumption of all risks of injury to its employees, is under no disability to transfer such risk to them as a part of the agreement of employment, for the negligence contracted against is not its own, but that of the railway company.

That in the foregoing synopsis the grounds upon which courts may set aside contracts by which common carriers seek to limit their liability as such are correctly stated appears from the discussion in *N. Y. C. R. R. Co. v. Lockwood*, 84 U. S. 357, 378, 21 L. Ed. 627, 640, where it was held that a drover, accompanying stock in shipment, might recover for injuries to himself resulting from the railway company's negligence, notwithstanding his execution of a contract expressly waiving his right to do so, in consideration of certain privileges said to have been given him in addition to those ordinarily granted to shippers. In the opinion it was said: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that, though they made 40 or 50 contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates, * * * being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected. If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the car-

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rier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could, with more reason, be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept." In contrast with the attitude in which these contracting parties stand to each other, the relations between the express agent and the railroad company are thus stated in the Voight Case: "It is evident that by these agreements there was created a very different relation between Voight and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voight as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him or to each other for injuries he might receive in the course of his employment was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voight only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger: But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no legal compulsion to enter into."

The vital question is whether in the eye of the law an express company really stands upon any different footing, in this respect, from any other shipper. That in any particular case it happens to be a powerful corporation cannot affect the matter. An individual, who had bargained for the right to carry merchandise for his neighbors upon periodical trips to and fro between his home and some commercial center, would doubtless be subject

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to the same rule. Whether a railway company acts as a common carrier in permitting express companies to make use of its facilities for transportation was elaborately considered in the Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, and a negative answer was there given. The conclusion reached by the court, and concurred in by all the justices but three (Justices Miller and Field dissenting, and Justice Matthews not sitting), was that a railway company is under no duty to handle the business of any express company, and that, by undertaking to do so for one company, it does not incur an obligation to offer equal privileges to others. This is in accordance with the weight of authority. 6 Cyc. 374, par. 5. In but two instances does there appear to have been a judicial decision to the contrary—in *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188, 2 Am. Rep. 31, and in *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430, 13 Am. Rep. 72. While these decisions were avowedly based upon common-law principles, they were also defended as conforming to local statutes.

However desirable it may be, in theory, to insist upon a railway company's offering no facility to one person or corporation that it will not extend upon equal terms to any other, as a practical matter, few concerns are engaged in the express business, and the number is not capable of any large increase, for in the nature of things it must be exclusive, or substantially so, as to each line of railroad. If under the law any applicant has a right to the same opportunity, at the hands of a railway company, to conduct an express business upon its lines that is granted to any other, it would seem that anything like a general exercise of the right would inevitably result in the carrier's being compelled, either to abandon the business altogether, or to take it absolutely into its own control. We acquiesce in the distinction made between the situation of the individual shipper and that of an express company, between the attitude toward the railroad company of the ordinary passenger and that of an express agent, and, as a necessary sequence, in the conclusion that the contract in question was valid, and effectually waived the right of Sewell to look to the railway company for compensation for any injury he might suffer through the negligence of its agents. This conclusion is in accordance with the weight of authority. 6 Cyc. 572; 2 Hutchinson on Carriers (3d Ed.) § 1018. In the last-named work, at the place indicated, it is said: "A contract between a railroad company and an express company that express messengers shall assume the risk of all accidents or injuries they may sustain in the course of their employment is not void as unreasonable or against public policy. And if an express messenger actually consents to be bound by the terms of such a contract, there can be no doubt that the contract may be pleaded in bar of any action brought by the express messenger against the

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railroad company, for injuries received in the course of his employment."

The cases are so thoroughly reviewed in the opinion in the Voight Case as to make unnecessary any reference to those already decided when that was written. Additional cases, including *Peterson v. R. R. Co.*, 19 Wis. 197, 96 N. W. 532, 100 Am. St. Rep. 879, are cited in Cyc. Ann. 1907, 451. Two cases of a contrary tendency are *Shannon's Adm'r v. Chesapeake & O. Ry. Co.*, 104 Va. 645, 52 S. E. 376, and *Davis v. Chesapeake & O. Ry. Co.*, 29 Ky. Law Rep. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458. The former, however, was controlled by the fact that the railroad company was not privy to the contract by which the express agent undertook to assume the risk of his employment. In the latter, reliance was placed upon a provision in the Kentucky Constitution that "no common carrier shall be permitted to contract for relief from its common-law liability," but the reasoning adopted would have led to the same result irrespective of this consideration. The Voight Case was decided against the railroad company by the Circuit Court, upon the theory that the decision in *N. Y. C. R. R. Co. v. Lockwood*, *supra*, established for the federal courts a different rule upon the subject from that which had already been definitely announced by the courts of last resort of Indiana and Massachusetts, and has since been followed by those of Illinois and Wisconsin. Justice Harlan based his dissent from the conclusion of the Supreme Court, "upon the broad ground that the defendant corporation could not, in any form, stipulate for exemption from responsibility for the negligence of its servants or employees in the course of business, whereby injury comes to any person using its cars, with its consent, for transportation." Consistently with the view so expressed, the same justice, together with Justice McKenna, also dissented in *Northern Pacific Railway Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, where it was held that one accepting a free pass might make a valid contract, releasing all claims on account of any injuries he might receive while using it, on account of the ordinary negligence of the carrier's employees. This is a question upon which there is some conflict in the decisions, but those holding an agreement so made to be void as against public policy obviously must rest upon some other consideration than a want of equality between the contracting parties.

Having determined, then, that Sewell had effectively waived any claim on his own part, it remains to consider whether, as a result of such waiver, the claim of his widow was defeated. The relation of the right of a person to recover damages, which he sustains from a personal injury negligently inflicted upon him by another, to the statutory right of his heirs to maintain an action (or to have an action maintained in their behalf) for their

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own loss occasioned thereby in case his death results has been frequently considered by the courts. The plaintiff in error regards *Railway Co. v. Martin*, 59 Kan. 437, 53 Pac. 461, as committing this court to the proposition that the injured person cannot by his contract in any way affect the right of the beneficiary of the statute. There the decedent had contracted that any liability for injuries he might receive through the negligence of another should not exceed \$1,000. The limitation was held to have no effect upon the amount the heirs might recover. In the opinion it was said: "It is an action, instituted by his widow as administratrix, for the benefit of herself and the children of the deceased. It is to recover their damages resulting from the death of the husband and father. It is to recover for the injury to them, rather than to the deceased. Against their rights the deceased had no authority to contract. The cause of action for which the plaintiff sues never accrued to him. It could only accrue as a result of his death. His stipulation, even if binding upon himself, is no defense against the statutory right of the plaintiff." The only question there involved, however, was whether a valid limitation upon the amount the injured person could recover for himself imposed a like limitation upon the amount to be recovered in behalf of his heirs. All that was said in the opinion was said with reference to that question, and no other was determined—certainly not the question here presented. That the case was rightly decided is apparent. Whatever connection there may be between the two actions or the two causes of action, there is none between the amounts that can respectively be sued for in each. He who receives the injury can recover for whatever loss he can prove he has suffered. Whether his loss be much or little, his heirs, if they can recover at all, can recover to the full extent of their actual damages—within the limits fixed by law—but no more. Therefore a restriction upon the possible amount of his recovery can have no effect upon the extent of heirs. This is a consideration seemingly overlooked in *I. C. R. R. Co. v. Cosby*, 69 Ill. App. 256, 262, where it is said: "If the husband cannot limit the amount of the recovery, much less can he take away the right of recovery altogether." Essentially the two causes of action referred to, although based upon the same wrongful act, are separate and distinct. Logically there is no reason why two actions should not be instituted and prosecuted to a conclusion—one by the injured person for the loss that results to him from the defendant's wrong, and the other by those dependent upon him, on account of the support of which they are deprived by his death, just as each spouse may sue for damages consequent upon a tortious injury done to the wife. A plausible argument might originally have been made that such was the purpose and effect of the Kansas statute (inasmuch as it provides [Code, § 420] that causes of

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action for injuries to the person shall survive), and that where the plaintiff in the first action died, it might be revived and prosecuted to judgment for the benefit of his estate generally, while the second action might also be maintained for the benefit of those immediately dependent upon him. Under such a statute, or such a construction, it might well be asserted that the two causes of action were entirely separate, and the waiver or satisfaction of one would not affect the other. But in *McCarthy v. R. R. Co.*, 18 Kan. 46, 52, 26 Am. Rep. 742, it was decided that the second action was, in a sense, a substitute for the first; that the first expired beyond revivor whenever the second accrued by the death of the plaintiff in consequence of the tort sued upon. This view is in accordance with the interpretation usually put upon similar statutes—that while the two causes of action are not the same, one depends upon the other, and any consideration that would be a bar to the first in the lifetime of the plaintiff would destroy the second.

The section of the statute under consideration reads: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Gen. St. 1901, § 4871. In 8 A. & E. Encycl. of L. 870, it is said: "When the right of action given by the statute is merely such as the deceased would have had if he had survived the injury, a release properly executed by him in his lifetime is a complete defense to an action by his personal representative, or others to recover damages for his death. The same rule is true where the statute is not a survival statute, but creates a new and distinct cause of action in favor of certain beneficiaries, if it provides that the right of action shall exist only in cases where the deceased himself might have maintained the action had he lived." And in 13 Cyc. 325: "Upon the question as to whether a release, executed by the deceased for the injury received by him, will continue a bar to an action by his representative or heirs for his death, there is considerable conflict of authority. However, the better rule is that where the party injured has compromised for the injury and accepted satisfaction previous to his death, there can be no further right of action, and consequently no suit under the statute, unless it be shown that such compromise or release was procured by fraud or duress."

The conflict referred to, as shown by the notes to the texts quoted, results chiefly from the decisions in Massachusetts and

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Kentucky construing the statutes of those states as penal rather than compensatory, and on that account upholding the right of the heirs to maintain their action, although the personal claim of the decedent had been satisfied. The cases on the subject are collected in *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S. W. 851, where it is said: "Whether the right of action is a transmitted right or an original right, whether it be created by a survival statute or by a statute creating an independent right, the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed." See, also, cases cited in 2 Supplement to A. & E. Encycl. of L. 319, and Cyc. Anno. 1907, 836. It can hardly be said that the adjudications show a substantial difference of opinion upon this phrase of the matter. In a note on the subject in 70 Am. St. Rep. 684, the editor says, after reviewing the decisions: "It is somewhat difficult to combat the logic which leads to such a conclusion. The rule, however, that no action for wrongful death is maintainable, except where deceased himself could have sued had he survived, applies to, as indeed it grew out of, matters pertaining to the nature and cause of the injury which resulted in death. Was the negligence or wrongful act of defendant the proximate cause of the injury? If not, deceased could not have recovered against him, nor can his successors under the statute. Did deceased's contributory negligence cause the injury? If so, any action for such injury is similarly barred. If the relation of master and servant subsisted between deceased and defendant, was the injury resultant from the act or neglect of a fellow servant, or was it, for any reason arising out of the rules of master and servant, such an injury as gave rise to no liability on the part of the defendant? If this is answered affirmatively, and, in the two cases mentioned before, no cause of action ever arose which was susceptible of release or compromise. Where, however, a cause of action does arise, and the injured party has a period of suffering and expense, there seems no reason that he should not be able, while living, to make an adjustment of his claim with defendant which would bar a recovery by his beneficiaries after his death upon the same claim. But the action given under other than survival statutes is entirely distinct from the action which deceased had at the moment prior to his death. It is an action for damages arising from the mere fact of death, not damages to the deceased, but damages to his successors under the statute. Therefore we cannot comprehend the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons.

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It would be necessary to support such a conclusion that we admit that a person has a right of action for his own death. A greater degree of absurdity would not be attained in the enactment of a statute making suicide punishable as murder in the first degree.

This argument is ingenious, and not lacking in plausibility, but we cannot regard it as affording sufficient ground for rejecting the doctrine referred to, which seems to have become thoroughly established as a part of the jurisprudence of statutory actions for death by wrongful act. Nor can we regard it as possible to distinguish between the effect of a settlement made by an injured person after his injury and a contract made by him in advance, founded upon sufficient consideration, and otherwise valid, waiving his right to recover. In principle such a waiver is an acceptance of satisfaction in advance, and, in theory at least; whatever the fact may be, one agreeing to such waiver as a part of his contract of employment exacts and receives an addition to his wages sufficient to compensate him for the risk of injury he assumes. The defense based upon such an agreement is essentially that the person injured assumed the risks of his employment, a defense which is recognized as available in actions under the statute referred to. *Rush, Admr'x, v. Mo. Pac. Ry. Co.*, 36 Kan. 120, 12 Pac. 582. Such assumption of risk, like contributory negligence, prevents a right of action accruing to him who receives the injury, and is therefore fatal as well to a recovery by his administrator. We are constrained to hold that the contract which would have prevented an action by Sewell in his own behalf also prevents a recovery in behalf of his heirs.

The judgment is therefore affirmed.

*GREEN, BURCH, and PORTER, JJ., concur. JOHNSTON, C. J., and SMITH and GRAVES, JJ., dissent.

On Rehearing.

MASON, J. This case involves the question whether a recovery may be had against a railroad company in behalf of the widow of an express messenger, who died as the result of an injury, received through the company's negligence while traveling in an express car in the performance of his duties, he having contracted with the express company not to hold either it or the railroad company liable for any such injury, and the express company having contracted with the railroad company to exempt the latter from liability therefor. Upon the first hearing the conclusion was reached (1) that if the express agent's agreement effectually waived his own right to recover for the injuries he received, no right of recovery ever accrued to his widow; and (2) that his contract was valid, and did have the effect stated. Three members of the court dissented from the result. Upon the rehearing the court, without dissent, adopts the view presented in the original opinion that the widow's right to maintain an ac-

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tion depends upon whether her husband could have maintained one; that unless a right of action accrued to him in his lifetime, none could accrue at his death to her. The question for present determination is therefore whether the employee of an express company can make a valid contract relieving a railroad company from liability to him for injuries received by him through its negligence while riding in an express car forming a part of one of its trains. A majority of the members of the court, not including the writer of this opinion, believe that this question must be answered in the negative, upon considerations now to be stated.

Since the former opinion was written, the cases there cited as upholding such contracts, of which *Baltimore & O. S. W. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, is a type, have been followed in *Robinson v. St. Johnsbury & Lake C. R. Co.*, 80 Vt. 129, 66 Atl. 814, 9 L. R. A. 1249, and in *D. & R. G. R. Co. v. Whan*, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432, the latter being a sleeping car conductor case, in a note to which, published in 11 L. R. A. (N. S.) 432, the authorities bearing upon the question involved are carefully and thoroughly collected, classified, and reviewed. It is not necessary now to determine whether this court will accept or reject the doctrine of the federal Supreme Court announced in the *Voight Case*. Granting that such doctrine is sound, and that the case was rightly decided, it does not follow that the contract made by Sewell was valid. There the question was determined solely upon the principles of the common law; here it is affected by the Kansas statutes. In the course of the opinion the court said: "The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement, between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employee of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants."

In Kansas a railroad company, by virtue of the statute (section 5858, Gen. St. 1901), is liable to its employees for injuries occasioned by the negligence of fellow employees, and such liability cannot be contracted against. *Kan. Pac. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630. If in this state a railroad company may by contract relieve itself from liability for injuries to an express messenger resulting from its negligence, it is able, to a

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certain extent, to avoid a part of the consequences of the statute cited. An express company performs for the public services which otherwise the railroad company would perform, and could be required to perform, if not in precisely the same way, at least by some means affording the public substantially the same accommodation. This is recognized in the opinion of the court in the Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, where it is said: "The real question is not whether the railroad companies * * * must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose. * * * It is no doubt true * * * that * * * every railroad company * * * has recognized the right of the public to demand transportation, by the railway facilities which the public has permitted to be created, of that class of matter which is known as 'express matter.'" "The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." The statute (section 1323, Gen. St. 1901) recognizes this obligation in the requirements that every railway company must furnish sufficient accommodation for the transportation of "express freight," and shall stop passenger trains at junctions long enough to allow the transfer of "express freight." If a railroad company chose to handle all express business itself, without the intervention of any other company, it could not, by any contract it could make, escape liability to its express messengers for injuries occasioned by the negligence of its other employees. To allow it, by devolving a part of its own proper function upon another corporation, to avoid the responsibility it would otherwise be under to the persons in immediate charge of the business would be to permit it to evade the force of the statute, and to accomplish by indirection what the law forbids to be done directly.

This is a consideration which might have been given weight in *Peterson v. R. R. Co.*, 119 Wis. 197, 96 N. W. 532, 100 Am. St. Rep. 879, for in Wisconsin the fellow servant rule has been abolished as to risks peculiar to railroads, but it was not there referred to; the court basing the decision upon the Voight Case, with but little independent discussion. It would also have been pertinent in *Louisville, N. A. & C. Ry. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348, for there the injury resulted from a defective bridge, and therefore under the Indiana statute the fellow servant rule did not apply, but it was not there mentioned. In *Bates v. Old Colony R. R.* 147

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Mass. 255, 17 N. E. 633, however, it was said in so many words that if the railroad had been doing the express business, the messenger could not have recovered, and this must have been true in *Blank v. Ill. C. R. Co.*, 182 Ill. 332, 55 N. E. 332, and in *Robinson v. St. Johnsbury & L. C. R. Co.*, 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249, for the fellow servant rule is in force in Illinois and in Vermont. Therefore no one of the cases named can fairly be regarded as an authority for the proposition that, where the fellow servant rule has been abrogated, an express company's agent can by contract relieve the railroad company from the consequences of its own negligence, and the list includes all the leading cases on the subject; that is, all the cases by which the law has been settled in an independent jurisdiction in line with the doctrine of the Voight Case.

In a brief lately filed as friends of the court by counsel for a litigant having a claim similar to that of Mrs. Sewell, attention has been called to the fact, which had previously been overlooked by the court, that except as the matter might be affected by the contract, the express messenger had a cause of action against the railroad company, not only upon common-law principles, but in virtue of the statute. In 1870 (Laws 1870, p. 197, c. 93) the Legislature passed an act declaring: "That railroads in this state shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies." Section 5857, Gen. St. 1901. The exact purpose of this enactment is not clear, since the liability it imposes or defines apparently is the same as that which already existed. Referring to it Mr. Justice Brewer, speaking for the court, said in *St. Joe & D. C. R. Co. v. Grover*, 11 Kan. 302: "Many interesting questions will arise under this section. Did the Legislature simply intend to give statutory force to the judicial determinations of the rules and limits of railroad liability? This hardly seems possible, or else they have chosen language most inapt. Evidently they proposed a change. By that change did they seek to wipe out the doctrine of contributory negligence as a defense to a plaintiff's action, and to make the companies liable in every case of negligence on their part, even though the plaintiff's negligence contributed equally or more to the injury? Did they intend to make the companies responsible in all cases for slight negligence?" The act has been held not to have abolished the fellow servant rule (*Kan. Pac. Ry. Co. v. Salmon*, 11 Kan. 83, 93), or the defense of contributory negligence (*K. C., Ft. S. & G. R. Co. v. McHenry*, 24 Kan. 501). It does not give a right of action for what is called "slight negligence," for this court does not recognize any degrees of negligence. *Mo. Pac. Ry. Co. v. Walters* (Kan.) 96 Pac. 346, decided at this sitting.

The act making railroad companies liable to their employees for injuries sustained through the negligence of its other employees

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was passed in 1874, in these words: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage." Section 5858, Gen. St. 1901. In the case already cited (Kan. Pac. Ry. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630), in which it was held that liability under this act could not be waived by contract, the reasons for such holding were thus stated: Prior to the statute of 1874 the rule of the common law prevailed in this state that a master was not liable to his servant for an injury happening in consequence of the negligence of a fellow servant engaged in the same general employment, unless charged with some degree of fault or negligence in the selection or retention of the fellow servant. The Legislature of the state has, however, changed the common-law rule, and the statute makes a railroad company liable for the negligence of one employee causing injury to a co-employee, without regard to the negligence of the company in selecting or retaining the employee. Whether this legislation be wise or not it is not within our province to determine. We must assume that the Legislature had satisfactory reasons for changing the rule of the common law, and, having adopted the statute, as we may assume, for wise and beneficial purposes, we do not think a railroad company can contract in advance for the release of the statute liability. It is a familiar principle of law that a contract made in violation of the statute is void, and also that agreements contrary to the policy of statutes are equally void. * * * Further, while the reasons for the rule of the common law that the master ought not to be responsible for injuries inflicted upon one servant by the negligence of another servant in the same common employment seem plausible and correct theoretically, yet we may assume that the Legislature did not find the practical operations of the rule as affording sufficient security to persons engaged in the hazardous business of operating railroads; that for the protection of the lives and limbs of the employees of such companies, the Legislature deemed it necessary to enact the statute making these companies liable for all damages done to any of their employees in consequence of the negligence of a co-employee. Now if the statute was enacted for the better protection of the life and limb of railroad employees, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer. Take this illustration: In some states—and in our own—the owners of coal mines which are worked by means of shafts are required to make and construct escapement shafts in each mine, for distinct means of ingress and egress for all persons employed or permitted to work in the mines. Such a

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statute is for the benefit of employees engaged in working in coal mines; but the owner of such a mine would not be permitted to contract in advance, with employees for operation of the mine, in contravention of the provisions of the statute. The state has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments, and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good, if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void, in regard to statutes intended generally to protect the public interests, or to vindicate public morals." A part of this language is broad enough to apply to contracts in avoidance of the liabilities defined by one statute, as well as those imposed by the other, for instance this: "The Legislature * * * having adopted the statute, as we may assume, for wise and beneficial purposes, we do not think a railroad company can contract in advance for the release of the statute liability. It is a familiar principle of the law that a contract made in violation of the statute is void, and also that agreements contrary to the policy of statutes are equally void.'

A statute exhibits the legislative policy of the state none the less because it is merely declaratory of the common law. Indeed it may reasonably be argued that the only effect of a statute confirming a right of recovery which already existed is to give it a firmer basis, perhaps, by placing it in the class of rights which cannot be contacted away. The statute of 1874 was in part declaratory. The only new right of recovery it gave was to an employee who was injured by the negligent act of his co-employee. It would hardly be contended that a railroad employee can by contract exempt the company from liability in all cases except where his injury was occasioned by the fault of a fellow servant. The statute of 1870, equally with that of 1874, was "made to carry out measures of general policy," and was "intended generally to protect the public interests" and "to vindicate public morals." It differs from it, mainly, in being more general in its terms, and of broader scope, and in not being exclusively for the protection of railroad employees. The argument based upon the relation of master and servant—the inequality of footing upon which they deal—fails in the case of the earlier act, except as its protection might be invoked by an employee. An express messenger, although employed only by the express company, is within the protection of that act. As to him, it is a

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measure guarding his life and safety while engaged in a business fraught with peculiar peril. While he does not deal directly with the railroad company, his contract is made with his employer, with whom he cannot treat on terms of perfect equality. Why may it not be said in his case as in that of the student brakeman in *Railway Co. v. Fronk*, 74 Kan. 519, 87 Pac. 698? "The state has an interest in the lives, health, and safety of its citizens, and whenever a business, although lawful in itself, is dangerous to the lives or injurious to the health of the employees engaged in conducting such business, it becomes a question of public concern, and the state may intervene in the interest of the public welfare. * * * The protection thus provided by the state for the safety of its citizens is a matter of public concern, and cannot be contracted away by the individual."

Iowa has for many years had a statute which, in effect combines in one section the provisions of the Kansas acts of 1870 and 1874. It reads: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." Section 2071, Code Iowa, 1897. In *O'Brien v. C. & N. W. R. Co.* (C. C.) 116 Fed. 502, it was held that in view of this statute the Voight Case had no application to a case arising under the laws of that state. In the opinion, it was said: "In addition to the obligation imposed by the common law, section 2071 of the Code of Iowa declares that a railway company shall be liable for all damages, sustained by any person, resulting from the neglect or mismanagement of any servant, agent, or employee of the company in connection with the operation of the railway. In *Rose v. Railway Co.*, 39 Iowa, 246, the state Supreme Court, in construing this statutory provision, held that it could not be limited to employees only, but that 'the language of the enactment includes all classes of persons sustaining damages from the negligence of the employees of the railroad company.' * * * To escape this liability is the purpose of the contracts in question, and under the doctrine announced by the Supreme Court in the Voight Case, so far as the common law is concerned, these contracts are to be held valid, and to be sufficient to defeat the liability which otherwise would be imposed upon the railway company for the injuries resulting to the messenger from negligence in handling and transporting the car occupied by him. What effect, however, upon their va-

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lidity, have the provisions of the statute of Iowa already cited?

* * * Thus it is declared, by the statutory enactment, to be the public policy of the state that corporations, engaged in the railway business in this state cannot by contract free themselves from the liability attaching to them as carriers of passengers and property; that they are liable to every person, including their own employees, for injuries resulting from the neglect, mismanagement, or willful wrongs of the agents or employees of the company engaged in the operation of the railway, and that no contract seeking to restrict such liability shall be legal or binding. * * * In the face of these provisions of the state statutes it is impossible to give any force or validity to the contracts relied on by the defendant in this case. Their clear purpose is to attempt to free the railway company from the liability which the state has seen fit to impose upon the company in the conduct of its business in Iowa, and which the state statute declares cannot be evaded by contracts entered into in violation of the provisions of the statutes; and it must be held that the clauses of the contracts, which are intended to free the company from liability for injuries caused by its negligence or that of its employees to express messengers, when engaged in their duties upon the trains of the company in Iowa, are invalid, and of no legal force or effect."

Of course the explicit language of the Iowa statute, declaring contracts in avoidance thereof illegal, compelled the decision there made, but the argument used in the opinion illustrates the view that the provisions for the protection of persons generally, and those for the especial benefit of employees, are of the same character, and equally to be regarded as showing the public policy of the state. In the Peavey Case, 29 Kan. 169, 44 Am. Rep. 630, this court said, referring to the Iowa act quoted: "With our interpretation of the statute of 1874, and the fairly inferred intent of the Legislature in enacting it, the omission therefrom of the addition in the Iowa statute, 'and no contract which restricts such liability shall be legal or binding,' does not empower a railroad company to evade its liability by contract." The reasoning by which that conclusion was reached applies with considerable, if not equal, force to the more general provision, which in Iowa is incorporated in the same section with the fellow servant law, but which in Kansas is covered by a separate enactment.

The decision of the trial court is reversed, and the cause remanded, with directions to enter judgment for the plaintiff.

JOHNSTON, C. J., and SMITH, GRAVES, and BENSON, JJ., concur.

MASON, J. (dissenting). I adhere to the view that the messenger could lawfully contract to relieve the express company from liability for injuries caused by negligence of the railroad company, because such negligence was beyond the control of the express company; that the contract between the express company and the railroad company was valid,

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because the former was not under any obligation to afford express facilities to the latter, and therefore could attach to its concessions any conditions it saw fit, even to the extent of avoiding liability for its own dereliction; and that the two contracts brought the messenger into privity with the railroad company, and effectually waived his claim to recover for his injuries.

In the Voight Case the court did not hold that the messenger was an employee of both companies. Had it done so, a reference to the fellow servant rule would have been sufficient to dispose of every question involved. As was said of this matter in *McDermion v. So. Pac. Co.* (C. C.) 122 Fed. 669, 676: "The court did not assert that the express messenger was an employee of the carrier corporation, but that he 'more nearly resembles that of an employee than that of a passenger'; and that his duties of personal control and custody of the express matter, if not performed by the express messenger, would have to be performed by a servant of the railroad company. It is evident that the learned justice presented this thought argumentatively, so that, if it were asserted that such messenger was an employee of or a fellow servant, there could be no recovery. Of course a railroad company cannot escape its statutory or other obligations by operating through another corporation. But express companies are not a device to enable railroad companies to accomplish such an evasion. The express business was originated, and has been built up by organizations devoted to that sole purpose, employing carriers already in existence. That situation was well understood when all the statutes referred to were enacted. If through inadvertence or oversight there was an omission to forbid such a contract as that here involved, the result is unfortunate, but the remedy lies with the Legislature, and not with the courts.

The decision in the Peavey Case is manifestly sound, but some of the expressions used in the opinion may be too broad to admit of general application. Not every right of action that is conferred by a statute in pursuance of a public purpose is of such character that it cannot be contracted away. Merely by way of illustration—doubtless any one would concede, as the plaintiff did in *Railroad Co. v. Blaker*, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, the validity of a contract exempting a railroad company from liability if it should set fire to a building which it voluntarily permits to be placed upon its right of way, notwithstanding the statute making it liable for fires negligently caused. See, also, in this connection, *Hartford Fire Ins. Co. v. C., M. & St. P. Ry. Co.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84. And the proposition seems reasonable that generally, wherever a carrier grants a privilege of a different kind from any that could be required of it, it may lawfully impose as a condition that it shall be exempted from some obligation in that connection which it would otherwise owe.

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I realize that the decision of the court accords with what one would naturally wish the law should be, and that the questions involved are difficult and doubtful. I dissent with much hesitation. My chief doubt, however, is whether the Express Cases, and therefore the Voight Case, were not wrongly decided.

PORTER, J. The dissenting opinion of Mr. JUSTICE MASON expresses my views.

BURCH, J. I dissent for the reasons stated by Mr JUSTICE MASON.

On Further Rehearing.

PER CURIAM. In a petition for a rehearing attention is called to the fact that, in ordering a reversal of the judgment, the court failed to mention one of the contentions made in behalf of the railway company. The petition is denied, but to remedy the omission noted this addition is made to the opinion already filed: The defendant in error contends that if the act of 1870 be so construed as to cut off the defense of assumption of risk by contract, the statute itself is void, because repugnant to the federal Constitution, and especially to the fourteenth amendment thereof, citing in support of this contention *K. C., Ft. S. & G. R. Co. v. McHenry*, 24 Kan. 501. That case established that the statute did not abolish the defense of contributory negligence; the writer of the opinion adding that such a construction would conflict with the constitutional guaranties of "equity of rights and remedies for injury by due course of law." In the present case the court interprets the statute no further than is necessary to determine the precise controversy involved. What is decided is that, under the acts of 1870 and 1874, an express messenger cannot, by contract made in advance, relieve a railroad company from liability for injuries, received through its negligence while in the performance of his duties upon its cars. In this we discover no conflict with any provision of either the state or federal Constitution.

LOUISVILLE & N. R. Co. *v.* GORMLEY.

(Court of Appeals of Kentucky, June 17, 1908.)

[111 S. W. Rep. 289.]

Carriers—Carriage of Live Stock—Injuries to Race Horse—Measure of Damages.*—In an action for injuries to a race horse during transportation, the jury in estimating damages should take into consideration the difference between the fair market value of the horse immediately before the injury and afterwards, and award such sum as will reasonably compensate the owner for any injuries the horse sustained resulting directly from the injury he received, including the expenses incurred in caring for the horse because of the injuries, but a recovery cannot be had for loss sustained on account of inability to keep racing engagements.

“Not to be officially reported.”

On petition for rehearing. Overruled.

For former opinion, see 109 S. W. 346.

PER CURIAM. Upon another trial the court should instruct the jury that in estimating the damages, if any, to which appellee is entitled, they should take into consideration the difference between the fair market value of the horse immediately before his injury and afterwards, and find in damages such sum as will reasonably compensate appellee for any injury the horse sustained that resulted directly from or was caused by the injury he received. The parties may also introduce evidence conducing to show the condition of the horse up to the time of the trial, but no recovery can be had for loss that may have been sustained on account of inability to keep racing engagements the horse was entered in, although damages are allowable for money expended in caring for the horse that was made necessary on account of his injuries.

Petition overruled.

*See generally foot-note appended to *Southern Ry. Co. v. Coleman* (Ala.), 27 R. R. R. 153, 50 Am. & Eng. R. Cas., N. S., 153; *Strange v. Atlantic C. L. R. Co.* (S. Car.), 27 R. R. R. 150, 50 Am. & Eng. R. Cas., N. S., 150; foot-note appended to *Louisville & N. R. Co. v. Mink* (Ky.), 27 R. R. R. 135, 50 Am. & Eng. R. Cas., N. S., 135; first foot-note appended to *Goodin & Goodin v. Southern Ry. Co.* (Ga.), 25 R. R. R. 590, 48 Am. & Eng. R. Cas., N. S., 590; third foot-note appended to *Missouri Pac. Ry. Co. v. Peru-Van Zandt Implement Co.* (Kan.), 25 R. R. R. 647, 48 Am. & Eng. R. Cas., N. S., 647; *Patterson v. Illinois Cent. R. Co.* (Ky.), 24 R. R. R. 434, 47 Am. & Eng. R. Cas., N. S., 434; *Gates v. Bekius* (Wash.), 24 R. R. R. 399, 47 Am. & Eng. R. Cas., N. S., 399; *McConnell v. Southern Ry. Co.* (N. Car.), 23 R. R. R. 580, 46 Am. & Eng. R. Cas., N. S., 580; first foot-note appended to *Cincinnati, etc., Ry. Co. v. Hansford & Son* (Ky.), 23 R. R. R. 526, 46 Am. & Eng. R. Cas., N. S., 526; second foot-note appended to *Norfolk & W. Ry. Co. v. Wilkinson* (Va.), 23 R. R. R. 290, 46 Am. & Eng. R. Cas., N. S., 290.

SAUVAN v. CITIZENS' ELECTRIC ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Essex, Jan. 11, 1908.)

[83 N. E. Rep. 405.]

Carriers—Street Railroads—Care as to Passenger.*—A street car company, having stopped its car to let a passenger on, is bound to keep the car standing until she has got entirely on the car; but, where the passenger is a strong, robust woman in apparently perfect health, it need not keep the car standing until she has seated herself.

Exceptions from Superior Court, Essex County; William Cushing Wait, Judge.

Actions by Mary B. Sauvan and Arthur V. Sauvan against the Citizens' Electric Street Railway Company. Judgments for plaintiffs, and defendant excepts. Exceptions sustained.

Defendant's fourth, seventh, eighth, and ninth requested rulings were as follows:

"(4) The defendant company, having stopped its car to let the plaintiff on, was bound to keep that car standing until the plaintiff had got entirely upon the car; but the defendant company was under no obligation to the plaintiff as a passenger to hold its car standing until the plaintiff had seated herself in the car."

"(7) The conductor was under no obligation to wait until Mrs. Sauvan had become seated before giving the signal to start.

"(8) The conductor was not negligent in starting the car when he did.

"(9) I direct you as a matter of law that there is no evidence of negligence in this case on the part of the conductor of the car."

John H. Casey, Nathaniel N. Jones, and Earnest Foss, for plaintiffs.

Guy Murchie, for defendant.

LORING. J. By the plaintiffs' evidence Mrs. Sauvan (who will be spoken of hereafter as the plaintiff) had stepped up over the steps into the vestibule and was fairly and fully on the floor of the vestibule of the car before the conductor rang the starting bell. What she complains of is that the starting bell was rung when she had put one foot on the floor of the car, had thrown her weight on to that foot, and was in the act of bringing the other foot up and forward. Her contention is that on this evidence the jury could have

*See foot-note appended to *Birmingham Ry., etc., Co. v. Hawkins* (Ala.), 27 R. R. R. 689, 50 Am. & Eng. R. Cas., N. S., 689.

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found that the conductor, in giving the signal to start the car when he did, did not use the care which is owed by a common carrier to one of its passengers.

If the starting signal was given when the plaintiff contends that it was given, it seems hardly possible that the car could have started before the second foot had reached the car floor, or at any rate it might well be contended that the conductor could not have anticipated an instantaneous response to his signal. But apart from that, it is settled in this commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car. *Weeks v. Boston Elevated Railway*, 190 Mass. 563, 77 N. E. 654.

In *Gordon v. West End Street Railway*, 175 Mass. 181, 55 N. E. 990, the passenger was in the act of getting onto the car. In *Hamilton v. Boston & Northern Street Railway*, 193 Mass. 324, 79 N. E. 734, it was not wholly clear that the plaintiff was fully and fairly on the car in the first place; in the second place, the plaintiff was in the act of caring for her two year old child when the starting signal was given; and in the third place, the car was not to start under ordinary circumstances. It was at the beginning of a curve.

In the case at bar there were no extraordinary circumstances. It is stated in the bill of exceptions that "Mrs. Sauvan looked and was in perfect health at the time of the accident, and was a large, robust woman, weighing about 170 pounds." For these reasons, at least four of the rulings asked for (namely, the fourth, seventh, eighth and ninth) should have been given.

No exception was taken to the portion of the charge as to the negligence of the motorman, which the defendant now complains of. The only exception taken by it was to the refusal to give the rulings asked for and to the charge, so far as it was inconsistent with them.

Exceptions sustained.

FARRIER v. COLORADO SPRINGS RAPID TRANSIT RY. CO.

(Supreme Court of Colorado, March 2, 1908. Rehearing Denied April 6, 1908.)

[95 Pac. Rep. 294.]

Negligence—Actions—Question for Jury.—Negligence or contributory negligence is, as a general rule, a question of fact for the jury, but may become a question of law for the court.

Same.—Where the question of negligence is dependent on inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions, whether negligence has been established is for the jury.

Carriers—Actions for Injuries to Passenger—Question for Jury.—In an action for injury to a street railway passenger due to another passenger so carrying a hoe that its handle caught under the hood of the forward car as it rocked up and down, and broke, hurling a piece back into the car, and striking him, whether the conductor's failure to cause the passenger to place his hoe on the floor of the car or to carry it in some other position was negligence held for the jury.

Same—Protection of Passengers from Other Passengers.*—A common carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of a fellow passenger that it is to carry him safely.

Same.—Where a street railway passenger so carried a hoe that its handle caught under the hood of the forward car as it rocked up and down, and broke, hurling a piece back into the car and striking another passenger, the test of negligence by the carrier is whether, in view of the condition of the roadbed, the position of the trucks, and consequent rocking motion of the cars, and all the surrounding conditions, the conductor ought, as a reasonable man, to have anticipated or foreseen, as a natural and probable result of the way in which a passenger held his hoe, that this or a similar accident would likely happen.

Appeal from District Court, El Paso County; William P. Seeds, Judge.

Action by Annie L. Farrier against the Colorado Springs Rapid Transit Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

Action for damages for personal injuries alleged to have been caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. The defendant company owns and operates

*For the authorities in this series on the subject of the duty of a carrier to protect passengers against other of its passengers, see footnote appended to *Brehony v. Pottsvills, etc., Co. (Pa.)*, 24 R. R. R. 603, 47. Am. & Eng. R. Cas., N. S., 603.

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a street railway between Colorado Springs and Manitou, with electricity as the motive power. On the day of the accident the defendant was running from Colorado Springs to Manitou a train of cars, consisting of a motor and an open trailer car, with seats in the latter running from side to side and about 12 in number, in which trailer plaintiff as a passenger for hire occupied a seat near the center. The attachment between the two cars was an automatic coupler, in good order, which allowed a play of about an inch. When the cars were in motion, there was a space of about eight inches between the hood, or projecting top, of the rear end of the motor, and the same part of the front end of the trailer car. At some point between Colorado Springs and Colorado City, C. E. Bennett, a plasterer by trade, in no way connected with defendant, who was on his way home from work, got on the train, and took the end seat upon the front bench of the trailer. He had with him some plasterer's tools in a sack, and a shovel and a hoe which he carried in his hands. The handle of the hoe was a long one, and when he held it, as he did, in an upright position, the top of the handle of the hoe extended above the roof of the trailer. The hoe rested on the floor, and the top of the handle was held against the front end or hood of the trailer, projecting several inches above the same. Neither plaintiff, who saw Bennett, nor any of the passengers, had or expressed any expectation or fear of any danger resulting to any passenger from the manner in which Bennett held the hoe. The conductor saw Bennett get on the car and collected his fare, and, until the conductor went forward into the motor car to collect a fare, he had Bennett under his constant observation, and during all this time, for several minutes and while the train was running 10 or 12 blocks, Bennett continued to hold the hoe handle against the hood of the trailer car, in which position no such accident would be likely to occur. The motorman was on the front platform of the motor car, and did not see or have his attention called to Bennett. While the conductor was engaged in collecting the fare, with his back towards the trailer, and Bennett for the moment was out of his sight, Bennett, it seems, becoming tired, let go of the handle of the hoe, so that its top rested upon the rear end of the hood of the motor car, the other end still being on the floor of the trailer. The evidence of plaintiff tended to show that the track along this portion of the road was rough. The trucks under these cars were in the middle, instead of at each end. When the train was traveling at a fair rate of speed, as it was on this day, because of the condition of the track and position of the trucks of the cars, there resulted a perpendicular rocking motion, and sometimes, while the rear end of the motor car was going up, the front end of the trailer car was going down. After Bennett relaxed his hold on the handle, the hoe itself still resting upon the floor of the trailer car, the end of the handle lay upon the rear end of the

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roof of the motor car. In the rocking motion of the cars the handle was caught under the rim of the rear hood of the motor car, and broken, and a piece thereof was hurled backwards through the trailer car and struck the plaintiff, inflicting the injuries to recover damages for which this action was brought. Neither the conductor nor any of the passengers made any objection to the act of Bennett in taking his tools aboard, or the manner in which he held the hoe, and no suggestion was made by the conductor to Bennett to lay down the tools in a horizontal position on the floor, or to put them in any other position than the one in which they were first held. The particular acts of negligence charged in the complaint are that the approximate cause of the injury was in allowing Bennett to get upon the car with his tools, shovel, and hoe, and in negligently permitting him to carry the hoe in a partially upright position, so that the handle thereof projected upwards and between the ends of the two cars. Both plaintiff and defendant introduced evidence, and, when they rested, the court, upon motion of its counsel, directed the jury to return a verdict for defendant, which was done, and judgment, entered accordingly.

George Gardner, for appellant.

McAllister & Gandy, for appellee.

CAMPBELL, J. (after stating the facts as above). The motion for a directed verdict was based upon seven specifications; and there is nothing in the record to show upon which ground or grounds the court rested its decision. It would seem, however, from the briefs of counsel, since to those points the argument is mainly directed, that the trial court was of opinion that the evidence failed to show that the defendant was guilty of the acts of negligence charged in the complaint, and that the approximate cause of the injury was the wholly independent, intervening negligent act of Bennett in dropping the hoe, for which defendant was in no way responsible.

The general rule is that the negligence of a defendant, or contributory negligence of plaintiff, is a question of fact for the jury. It may, however, become a question of law for the court. The circumstances in which a court may direct a nonsuit or a verdict for defendant in this class of cases have been stated by this and other courts in different language. In *D. & R. G. R. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121, we said: "When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instructions, whether or not negligence has been established." In *Griffith v. Denver Consolidated Tramway Company*, 14 Colo. App. 504, 61 Pac. 46, it was said: "Where the facts are not in

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dispute, and there can be but one opinion as to their effect, the question is one of law, and it is proper for the court to decide it." In *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, 21 Pac. 148, it was said: "If the evidence, in the most favorable light in which it may be reasonably considered in behalf of the plaintiff, does not show, nor tend to show, the defendant guilty of the negligence causing the injury as alleged in the complaint, then the court may properly grant a nonsuit or direct a verdict in favor of the defendant." And the court further said, in substance, what has already been quoted from the *Spencer Case*, *supra*. Other cases hold that if, under the most favorable light that can be taken of the evidence in plaintiff's favor, the court would feel bound to set aside a verdict in case the jury should find for him, the case should be withdrawn from the jury and a nonsuit, or verdict for the defendant entered. The difficulty is not so much in the ascertainment of the correct rule applicable, as in applying it to the ever varying facts of such cases as they arise. It is very rare, indeed, that a case presenting the same facts as the case in hand is obtainable, and, as might be expected, we have not found among those cited by counsel or others which we have examined one such as this.

Plaintiff maintains that the *Spencer Case*, *supra*, and *Colorado Mortgage & Investment Company v. Rees*, 21 Colo. 435, 42 Pac. 42, are on all fours with this, and conclusive that the trial court erred in directing a verdict. While some of the questions therein and some of the principles involved are the same as here, the facts of each case are, in material respects, different. In the *Spencer Case* the approximate cause of the injury was the negligence of a servant of the railroad company in leaving in an exposed condition near to the track of an approaching train a truck, which, colliding with the train, hurt one lawfully on the depot platform. In the *Rees Case* it was a defect in the construction of the lock of a door of an elevator, a failure of the owner to provide reasonably safe means of transit, by which a passenger was injured. Here the negligence claimed is the failure of defendant's conductor to exercise the proper care and control over a fellow passenger, whose act was such as to cause a reasonably prudent man to anticipate this, or a similar, accident, as the natural or probable result of the manner of holding the handle of the hoe by that passenger, which care, if exercised, would probably have prevented the injury. It would serve no useful purpose to discuss at length the various cases pro and con cited by counsel, as none of them are of much aid, except as stating the general rule which measures the duty of a common carrier for hire to protect one passenger from another. It may be true, as defendant's counsel say, that if Bennett, the fellow passenger, had continued to hold the handle of

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the hoe in the position it was when he was under the eye of the conductor, it would not be possible for such an accident to occur; and it may also be true that had the roadway been smooth and the trucks of these cars been at the ends, instead of the middle, there would have been no reason to anticipate or foresee that the handle would likely be caught in the hood of the motor car and broken, and a piece thrown backward into the trailer. But, considering the condition of the track and the position of the trucks, and the consequent rocking up and down of these cars, to which there was evidence, and of which the conductor and the passengers were aware, we cannot say as matter of law that the consent which the conductor gave to Bennett to carry this hoe as he did was a proper exercise of control over a fellow passenger, or that his failure to cause Bennett to place his hoe on the floor of the car or to carry it in some other position was not negligence. It has been declared by our Court of Appeals, and we think it a correct statement, that a common carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of a fellow passenger that it is to carry him safely. Hence the authorities cited by defendant to the point that defendant was in no respect responsible for the acts of Bennett are not applicable, for he was a fellow passenger of plaintiff, against whose negligence defendant was bound to shield her by the exercise of the utmost vigilance.

In *Wright v. Railroad Company*, 4 Colo. App. 102 Pac. 196, the court, by Thompson, justice, said: "It is now firmly established that a carrier of passengers must exercise the same degree of care to protect them from violence from their fellow passengers, or from intruders, that is required for the prevention of casualties in the management and operation of its trains." And, as to this duty, there is no difference between mere negligence and willful misconduct. *Ferry Companies v. White*, 99 Tenn. 256, 41 S. W. 583. The rule to be extracted from the cases cited by the defendant itself is thus succinctly stated in *Flint v. Norwich Transp. Co.*, 6 Blatchf. (U. S.) 158, 161 Fed. Cas. No. 4,873: "The defendants were bound to exercise the utmost vigilance and care in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated, or naturally be expected to occur, in view of all the circumstances." The same rule is announced in *Putman v. Railroad Companies*, 55 N. Y. 108, 14 Am. Rep. 190, cited to the point that no negligence of defendant was here shown. The court there said substantially that a defendant is bound to exercise all the means he can command whenever occasion requires to protect one passenger from another, and that if "a passenger receives injury which might have been reasonably anticipated or naturally expected from one who is improperly received, or permitted to continue as a passenger, the carrier is

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responsible." See, also, *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 307; *Loftus v. Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Morris v. Railroad Co.*, 106 N. Y. 678, 13 N. E. 455. In *Cole v. German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, Sanborn, Circuit Judge, discusses with marked ability the liability of a defendant in a case which, in some aspects, is like this, and in the course of the opinion refers to *Investment Co. v. Rees*, *supra*, in such a way as to indicate that in all respects the opinion therein does not meet with his approval. In case of conflict our duty would be plain; but we think the *Cole Case* can be distinguished from the *Rees Case*, and certainly from the one in hand. On the *Cole Case* the court said that the sole and proximate cause of the injury was the wanton act of a trespasser over whom defendant had no control, of whose presence it was unaware, and for whose acts it was not liable, and then laid down what, under the facts of that case, we consider to be the true doctrine: That, if an injury could not have been foreseen or reasonably anticipated as the natural or probable result of an act of negligence, it is not actionable, because such act is neither the remote nor any cause whatever of the injury. The test which the authorities furnish for this case is: In view of the condition of the roadbed, the position of the trucks, the rocking motion of the cars, and all the surrounding conditions, ought the conductor, as a reasonable man, to have anticipated or foreseen as a natural and probable result of the way in which Bennett held his hoe that this or a similar accident would likely happen? If so, there was negligence of defendant; if not, there was none. We must not however, be understood as holding as matter of law that the act of the conductor in permitting Bennett to get on the cars with his tools and suffering him to carry the hoe handle in the position he did was a negligent act, or that it was the approximate cause of the injury. We merely say that in the light of all the evidence the case should have been submitted to the jury under appropriate instructions, to determine these questions of fact. The case, we admit, is on the border line; but we think it comes within the rule often announced by this court which requires submission to a jury.

Judgment reversed.

GABBERT and MAXWELL, JJ. concur.

HOWARD v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky, Dec. 4, 1907.)

[105 S. W. Rep. 932.]

Evidence—Weight—Verdict.—A verdict contrary to the testimony of one or more witnesses testifying to a fact is not necessarily against the evidence, though there is no evidence to the contrary, as the jury have the right to give such weight to the evidence as in their discretion it is entitled to.

Witnesses—Credibility—Manner of Testifying.—The jury in weighing the testimony of a witness may consider his demeanor and appearance, and from these and other circumstances may conclude that the witness is not worthy of credit and disregard his entire testimony.

Carriers—Passengers—Injuries—Negligence—Question for Jury.—In an action against a street railway for injuries to a passenger in the act of taking a seat, alleged to be due to the sudden starting of the car, a verdict in favor of the company held not contrary to the evidence.

Pleading—Amendments—Allowance.—Where, in an action against a street railway company for injuries to a passenger in the act of taking a seat, alleged to have been caused by the sudden starting of the car, the answer controverted the averments of the petition and pleaded contributory negligence, the allowance, during the trial, of an amended answer denying that the passenger attempted to board the car, was not erroneous; it not changing the issues.

Carriers—Passengers—Negligence.*—It is not the duty of operatives of a street car to keep the car stationary until a passenger has seated himself, and a passenger injured while in the act of taking a seat, in consequence of the starting of the car, cannot recover unless the car was recklessly started.

Same.†—In an action for injuries to a street car passenger caused by the sudden starting of the car, an instruction that if the passenger, after boarding the car in safety, fell by reason of the ordinary movements of the car in starting, a verdict must be rendered for the company, was not erroneous, for, if the ordinary and usual movements of the car in starting caused the passenger to fall, the company was not liable.

Same — Contributory Negligence — Instructions.—Where the evidence showed that plaintiff with a market basket in her hand boarded a street car, and that while she was going in the door of the car, or immediately after she stepped inside, the car started with a violent

*See foot-note appended to *Birmingham Ry., etc., Co. v. Hawkins* (Ala.), 27 R. R. R. 689, 50 Am. & Eng. R. Cas., N. S., 689.

†See second foot-note appended to *Ranous v. Seattle Elec. Co.* (Wash.), 26 R. R. R. 621, 49 Am. & Eng. R. Cas., N. S., 621.

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jerk, causing her to be thrown against a seat, injuring her, a charge on contributory negligence was not prejudicial.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Mellie Howard against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. O. Bradley and Popham & Webster, for appellant.

Farleigh, Strauss & Farleigh, Forch & Field, and *Green & Van Winkle*, for appellee.

CARROLL, J. Appellant, who was plaintiff below, brought this suit against appellee to recover damages for injuries sustained by the alleged carelessness and negligence of appellee's agents and servants in suddenly and violently starting a street car upon which appellant had entered as a passenger and was in the act of taking a seat. An answer controverting the averments of the petition, and pleading contributory neglect, was filed, and this pleading, together with a reply and an amended answer that will be hereafter noticed, constituted the pleadings in the case. A trial had before a jury resulted in a verdict in favor of appellee. Appellant asks a reversal of the judgment upon the verdict (1) for error in allowing an amended answer to be filed, (2) error in instructing the jury, and (3) because the verdict was flagrantly against the evidence.

The witnesses who testified in behalf of appellant were herself, her daughter, and her daughter-in-law. On the evening of December 24, 1905, they boarded a Shelby street car at the corner of Seventh and Market streets for the purpose of going to their home in the eastern part of the city. Appellant, with a market basket in her hand, got on the car first, closely followed by her daughter-in-law and her daughter. They testified that while appellant was going in the door of the car from the platform, or immediately after she stepped inside, the car started with a violent jerk, causing her to be thrown against one of the seats, injuring her quite severely, and that except for the fact that she was caught by the conductor appellant's daughter would have been thrown from the step on which she had gotten in her effort to board the car, and that the daughter-in-law was only saved from falling by catching hold of the door. Neither of the parties made any complaint to the conductor or motorman that the car was started either too suddenly or violently, nor did they inform them that appellant had received any injuries, nor was appellee company advised of the fact until some days afterwards. The motorman and conductor on the car, both of whom testified for appellee, knew nothing about the accident, as neither

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of them were apprised of it at the time, although both of them say that the car was not negligently or carelessly started at Seventh street.

As three witnesses testified to the fact that the car was suddenly started with a violent jerk, and there was no direct evidence to the contrary, counsel for appellant earnestly insist that the verdict was palpably against the evidence. In trials by jury it does not follow that because one or more witnesses testify positively concerning a fact, and there is no evidence to the contrary, the verdict must be flagrantly against the evidence. The number of witnesses who testify to a fact is not necessarily a controlling feature in determining its truth; neither does the fact that their evidence may not be contradicted by word of mouth compel its acceptance as true. The jury have the right to disregard the whole or any part of the testimony of any witness, and it is their province to give such weight to the evidence as in their judgment and discretion it is entitled to. In considering the weight to which evidence is entitled, and the credibility that shall be attached to the words of the witness, the jury may, and often do, take into consideration the demeanor, the appearance, and the manner of the witness, and, from these and other circumstances that come under their observation during the trial, may conclude that the witness is not worthy of credit, or is not testifying to the truth, and disregard his entire testimony. We do not, of course, intimate that appellant or the witnesses who testified in her behalf were not telling the whole truth, but only express the opinion that the question of what weight, if any, shall be given to the testimony of a witness, is peculiarly within the province of the jury. The fact that neither appellant nor the persons in company with her made any complaint to the persons in charge of the car was a potent fact that, no doubt, largely influenced the finding of the jury. There is no evidence whatever indicating passion or prejudice on the part of the jury. Indeed, it is highly improbable that a jury should be biased in favor of the defendant in a suit against a corporation by a woman, or predisposed to return a verdict against her. But, whatever induced them in the face of this evidence to disregard it, we are not disposed to interfere with their conclusion. Every person who has had experience in the trial of jury cases knows that the court, the jury, as well as the attorneys, give close attention to the manner of the witnesses while testifying, and their demeanor in the courthouse, and are sometimes more strongly influenced and impressed by appearances than they are by the words of the witnesses; and so it is that appellate courts, who do not see the witnesses and have no opportunity of forming any conclusion from their appearance or conduct, are reluctant to interfere with the findings of those who do see them and have the right to consider what they see

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as well as what they hear in making up their decision. A stronger impression may be made on the juror's mind by what he sees than by what he hears. A jury can see as well as hear, and has the right to use his eyes as well as his ears in making up his mind as to what weight, if any, shall be given the evidence of a witness.

During the examination of the witnesses, probably when all the testimony was in, the court permitted appellee to file an amended answer, denying that appellant attempted to board the car. We are unable to perceive in what respect the rights of appellant were prejudiced by this amendment. Indeed, we doubt if it was necessary that it should have been filed. When offered, no request for a continuance was sought by appellant; nor does it appear that other than a formal objection was made to its filing. It did not change in any material way the issues presented by the pleadings or the evidence, and it cannot with any degree of propriety be said that the lower court committed an error in permitting it to be filed.

Instruction No. 4, which is criticised as being an improper presentation of the law of the case and inapplicable to the facts, is as follows: "It was not the duty of the agent or servant of the defendant in charge of the car which plaintiff attempted to board to have the car remain standing until plaintiff was seated in said car, and unless you believe from the evidence that the said agent or servant in charge of said car failed to exercise that degree of care which is imposed upon him as set out in instruction No. 3, and by recklessness or jerks or lurch of said car started the same, and the plaintiff was injured thereby, the law is for the defendant, and you should so find." This instruction is taken from *Bennett v. Louisville Railway Company*, 90 S. W. 1052, 4 L. R. A. (N. S.) 558, 28 Ky. Law Rep. 998. In that case the plaintiff, Bennett, alleged, in substance, that the motorman stopped the car for her, and as she entered the door of the car and was in the act of taking a seat the motorman negligently turned on the current and started the car with a sudden and unusual jerk, by which she was thrown with great force and violence against the edge or end of a seat. The striking similarity between the facts of that case and this will be noticed at a glance, and, the instruction being the same as the one approved in the Bennett Case, the court properly submitted it as presenting a correct statement of the law upon the point under consideration. As aptly said in the Bennett Case: "It would be impracticable to require in every instance those in charge of a street car to have it remain still until every passenger that boards it takes a seat. This would make street car travel slow and vexatious and inconvenient." Upon a reconsideration of the instruction, we believe it to be a fair statement of the law, and adhere to it.

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Other instructions are complained of, especially one saying to the jury that if appellant, after she boarded the car in safety, fell against a seat by reason of the ordinary and usual movements of the car in starting, they should find for the defendant. We are not able to agree with counsel that this instruction is open to objection. Ordinary and usual movements of the car in starting might have caused appellant to lose her balance and fall, but, if so, the company would clearly not be liable. They are only negligent and responsible for injuries when the car starts in an unusual or violent manner, and not in the ordinary way.

The instruction upon contributory negligence could not in any state of case have been prejudicial.

The record shows that appellant, viewing her case from any standpoint, had a fair trial, and that no error to her prejudice was committed.

Wherefore the judgment is affirmed.

MOBILE, J. & K. C. R. Co. v. JACKSON.

(Supreme Court of Mississippi, April 13, 1908.)

[46 So. Rep. 142.]

Evidence—Weight and Sufficiency—Uncontroverted Evidence—Jury's Duty.—Juries cannot arbitrarily and capriciously disregard testimony which is unimpeached and supported by all circumstances in the case.

Carriers—Drunken Passenger Drowned after Alighting—Action for Death—Evidence—Sufficiency.—Evidence in an action against a railroad company for a passenger's death alleged to have resulted from the company's wantonness in ejecting him from a train when he was drunk to insensibility under conditions necessarily resulting in his drowning or freezing held insufficient to sustain a verdict for plaintiff.

Trial—Instructions Not Sustained by Evidence.—Instructions not sustained by evidence are properly refused.

Same—Jury's Province—Weight of Evidence.—Juries are the judges of the weight of the evidence submitted to them.

Same—Instructions.—An instruction which submits as a doubtful question a matter on which there is no conflicting evidence is improper.

Same—Credibility of Witnesses.—Juries are the judges of credibility of witnesses.

Carriers—Drunken Passenger—Action for Death—Instructions.*—In an action against a railroad company for the death of a drunken

*See first foot-note appended to *Black v. New York, etc., R. Co.* (Mass.), 23 R. R. R. 44, 46 Am. & Eng. R. Cas., N. S., 44.

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passenger, who was drowned after alighting, it was error to instruct that the jury should not consider his drunkenness, but should view his conduct in the same light as they would that of a sober man in similar circumstances.

Same—Conductor's Duty.†—If a railway conductor knew that an alighting passenger was so drunk that he was unable to care for himself, the conductor should have dealt with him according to the condition he was then in, and with view of what would reasonably happen to him if left at the place where he desired to alight.

Appeal from Circuit Court, Union County; J. B. Boothe, Judge.

Action for death by Mrs. V. C. Jackson against the Mobile, Jackson & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Fontaine & Fontaine and *May, Flowers & Whitfield*, for appellant.

C. Lee Crum, for appellee.

WHITFIELD, C. J. Learned counsel for the appellee says frankly in his second brief that "the case at bar is for injuries resulting from the action of the conductor and crew in putting off deceased after he had passed Ecu, his destination, at a time and place and under conditions that would not only reasonably lead to his death, but must necessarily have resulted in drowning or freezing him to death"; and the declaration itself plainly shows that the suit is practically, if not exclusively, for punitive damages for the alleged willful and wanton wrong of the appellant company in ejecting the deceased from the cars of appellant when the deceased was drunk to insensibility and utterly incapable of sitting, walking, or standing, the appellant well knowing of these facts, and at a time and place—that is to say, in the night-time and at a flag station, with the ground covered with ice, sleet, and snow—when to so put him off in such condition meant death.

Now, what is the case made by the testimony? Practically this: The deceased, Jackson, a section hand 58 years old, strong and robust, and one Purvis, 21 years old, got to drinking Peruna in the town of New Albany on the 2d of February, 1905, the day of the night on which Jackson was drowned, and drank along through the day a good deal of Peruna. They boarded the cars, having purchased tickets from New Albany to Ecu. After they got on the car they drank about a bottle and a half more of Peruna, making about four bottles or more of Peruna that the two consumed during the day and this part of the night. The conductor took up Purvis' ticket. He did not take up Jackson's ticket; but Jackson told him he had, and the conductor

†See foot-note appended to *Thixton's Ex'r v. Illinois Cent. R. Co.* (Ky.), 20 R. R. R. 294, 44 Am. & Eng. R. Cas., N. S., 294.

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yielded the point. It is clearly shown that Jackson's ticket was found in his pocket after his death. It is further clearly shown, by the uncontradicted testimony of the conductor, that after the train had passed Ecu the conductor asked these two men where they were going, and they told him they were going to Ball's Crossing, whereupon he collected the cash fare from each, from Ecu to Ball's Crossing. Learned counsel for appellee says, in the passage just above quoted, that the suit was for putting off the deceased after he had passed Ecu, his destination. There is not a particle of testimony to contradict the statement of the conductor that took the cash fare from Ecu to Ball's Crossing; and it is shown, also, without contradiction, by two or three witnesses, that both Purvis and Jackson said they were going to Ball's Crossing—one witness saying to a party, another witness saying to a dance, and by another witness that he invited Jackson to go home with him that night, and he declined to do so, saying that he was going to Ball's Crossing, and by the conductor and another witness, all uncontradicted, that the conductor offered to take Jackson to Pontotoc free, if he would go on, which Jackson declined, insisting on getting off at Ball's Crossing. Learned counsel for appellee insist, too, in the statement quoted, that the suit is for the ejection, or putting off, of the deceased. The whole testimony, uncontradictedly, shows that Purvis and Jackson were put off or ejected, but that the one got off, Purvis, and the other, Jackson, was assisted off, on their own demand and upon their own insistence.

The strongest feature of appellee's case is his insistence that Jackson was drunk to the point of insensibility when he got on the cars—so drunk that he could not sit, stand, or walk, or in any manner take care of himself, and that this condition was thoroughly known to the conductor, and that hence the conductor, in allowing him to get off even, or be assisted off in that condition at the place, a public crossing and flag station, with the ground covered with sleet and snow and ice, and the temperature freezing, was guilty of willful and wanton wrong, for which the company should answer in punitive damages. But on the point how drunk Jackson was when he got on the cars at New Albany, and how drunk he was after the continued drinking on the cars between New Albany and Ball's Crossing, the testimony is in utter conflict; the clear preponderance of the testimony, however, being that, whilst perhaps drunk when he boarded the cars, he was not then in any insensible condition, and that whilst, of course, much drunker when the train reached Ball's Crossing, he yet could walk, though staggering—had walked down the aisle and taken his seat on the opposite side from the one he had been sitting on—had walked down and demanded to know if a certain point was Ball's Crossing, and was cursing and boisterous throughout the ride. It is true that on the testimony of the wit-

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ness Will Buchanan alone the jury might well have found that he was, at the time the train reached Ball's Crossing, too drunk to walk or stand, and that this condition was known to the conductor; but the testimony of the other witnesses is positive, and directly to the contrary of the statement of Buchanan about this, and the clear preponderance of the evidence, on this record, would go no further than to show that Jackson was drunk when they reached Ball's Crossing, but that he could walk, though having to be assisted down the aisle and down the steps to keep him from falling, and that he knew what he was doing, since he peremptorily declined the conductor's offer to take him to Pontotoc, and insisted, repeatedly, that he would get off at Ball's Crossing, and did get off, in pursuance of his own demand, together with Purvis. Another curious fact testified to by Will Buchanan is that he was put off on the right side—that is, the west side—going towards Pontotoc, of the railroad track, and yet was found drowned the next day on the east side. Now, the railroad track is shown to have been from 8 to 10 feet high. Will Buchanan further testified that he rolled down the dump on the right side of the track. It seems perfectly conclusive, from this statement of Buchanan's, that Jackson could walk and did walk, in some way, from the west side of the track, over the railroad, to the east side of the track, where he was found drowned the next day.

Now, from this rough outline, which we will fill in more in detail further on in this opinion, some things are perfectly clear: First, that there is not one particle of testimony in this record anywhere to show that Jackson was put off or ejected. He was simply permitted to get off, and assisted off at the place, Ball's Crossing, at which he insisted on debarking, together with Purvis, and yet the plaintiff's case proceeds upon the theory that Jackson was wantonly and willfully ejected. It is perfectly plain that he did pay his fare from Ecru to Ball's Crossing. Learned counsel for appellee insist that the jury found that this was not true; but the jury had no right, arbitrarily, to make any such finding on the testimony in this record. There is no contradiction of the conductor's statement; nor is there any contradiction of the testimony of the witnesses, who state that they both insisted on going to Ball's Crossing and getting off there. Juries cannot arbitrarily and capriciously disregard testimony of witnesses, not only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case. And from this it results, of course, in the third place, that Ecru was not Jackson's destination, and that he was not carried past his destination, when he was carried to Ball's Crossing. Here, then, are three things set out in the statement quoted from, the plaintiff's second brief, as constituting the grounds of his action, not one of which is supported by the

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testimony. And when we come, in the fourth place, to the only proposition on which the plaintiff could possibly recover, to wit, the one above stated, that the conductor, knowing that Jackson was drunk to the point of insensibility, and utterly unable to take care of himself in any way, put him off willfully and wantonly in that condition at a time and place and under circumstances which must have resulted necessarily in his death, we find one of the witnesses for the plaintiff, Buchanan, opposed to the rest of the witnesses testifying on the point, supported, it is true, by Purvis as to the statement that Jackson could not walk at Ball's Crossing. We do not say that the jury, as to this last point, on all the facts set out in this record, may not have been warranted in believing Buchanan. We leave that open, for there are circumstances testified to here and there in the record tending to support his testimony, as, for example, there is testimony that when Jackson himself got up and took one step, Purvis asked the conductor to have him assisted off, and three brakemen, one on each side and one behind, took hold of him and assisted him down the aisle and down the sheet-covered steps of the car to the ground. This would indicate that he was so drunk that he could not walk without staggering—could not get off without assistance; but it does not necessarily follow from this that he was drunk to insensibility, or so drunk that he could not say what he wanted to do, and direct the conductor as to where he wished to get off. There is other testimony that he was "drunk, but could navigate." and that he could walk, at Ball's Crossing, and even that he "could have gotten off by himself, unassisted, if he had been given time enough." It is true, on the other hand, that the conductor himself admits that he heard one of the brakemen say, just as the train had started and had gotten not more than 50 yards from Ball's Crossing, that the last he saw of Jackson he was rolling down the dump. Suffice it to say that the testimony on this vital point may, on this record, be said, so far as the clear preponderance is concerned, to be against the case as made out of Buchanan's testimony, and to tend strongly to establish the proposition that Jackson, while drunk when he got on the train, and much drunker at Ball's Crossing, nevertheless was not drunk to the point of insensibility, but was mentally, at least, capable of saying what he wished to do, where he wished to get off, and insisted upon having his way about that, and that he did get off in pursuance of his own demand, and was in no sense of the word ejected or put off.

Another curious feature about the testimony will be noted, and that is this: That whilst the court instructed the jury that no punitive damages could be allowed in this case, and hence the case was left to stand alone upon such actual damages as the proof showed, there is not one particle of evidence in the case to show what the earning capacity of Jackson was—how much

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money he was making per month or per year; in short, not a syllable of testimony as to what he was earning for the support of his wife and children—what he was worth as a bread-winner. How a jury could render a verdict for \$5,000 damages on the record thus made by this case on these instructions passes all comprehension. It must be referable solely to passion and prejudice, or misleading intention; for it can find no support in any legal view possible to be taken of the case as made by the record. We have gone through this record on the facts repeatedly, and given the case a most critical and thorough examination, and we have stated it thus fully for the purpose of demonstrating the utter lack of support to be found for the verdict of the jury, either in the law or the testimony in the case.

We add another observation or two as to the testimony. Jim Lyons, who was not in the service of the railroad company, testified uncontradictedly that he asked Jackson to go home with him, and Jackson said, "No," he wanted to go to Ball's Crossing; and, further, that he heard the conductor, Newberry, say to Jackson, "Mr. Jackson, if you will go on to Pontotoc, and not get off" (that is, at Ball's Crossing), "I will take you free," and Jackson said, "No, sir," he wanted to stop at Ball's Crossing. There is no contradiction of any sort of this testimony of this disinterested witness. A very earnest effort was made by the learned counsel for the appellee to elicit from this witness a statement that the conductor said he did not wish to put Jackson off, on account of its being so cold and Jackson being helpless, and the witness did so answer once; but in the further progress of his examination he says repeatedly that he could not say that that was the reason, finally saying, "Well, I never heard him [the conductor] say no reason;" and this witness further states that he was "sure Jackson could walk around when he got to Ball's Crossing, and that Jackson was standing up on the ground when he, the witness, stepped back into the coach." The witness Will Harvey, who was, however, an employee of the railroad company, makes a very positive statement that Jackson, when the train ran into an open switch at Cherry Creek, walked down the aisle and asked if this was Ball's Crossing, and that, when the train stopped at Ball's Crossing, Jackson got up and started out, and was staggering in the aisle, when the conductor had him assisted off, and that, the last he saw of him, he turned and started and was standing up, and Purvis standing by him and holding him. It must be said, however, that this witness was still in the employ of the company, and that he was flatly contradicted on a material point by Will Mercer, another witness, himself, however, the son-in-law of Jackson. Newberry, the conductor, testified throughout with great apparent frankness; some of his testimony being damaging to the railroad company. He says that he had him assisted off because the steps had ice and sleet on them, and

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he says, what several other witnesses testify to uncontradictedly, that both Purvis and Jackson were put off in pursuance of their insistent demand to be put off at Ball's Crossing, and that, whilst "both were drinking, neither was so drunk that he was not able to walk around through the train." H. B. Adams, a clerk in Memphis, Tenn., testifies, without contradiction, that the destination of Jackson was Ball's Crossing, and that they both said they wanted to get off at Ball's Crossing, and that they were going to a party there, and that Jackson got up out of his seat, and was assisted, after getting up, by the porters, and that Purvis himself asked the conductor to help him get Jackson off the train, and, further, most significantly, that "Jackson might have gotten off by himself, if he had been given time," and that he saw Jackson get up and walk down the aisle before they got to Ball's Crossing, and take a seat on the opposite side from the side on which he had been sitting. This witness is in no manner impeached, and appears to be perfectly disinterested. W. R. Brown, a traveling salesman from Memphis, testified that Purvis and Jackson took the train for Ball's Crossing, and that he saw them take two or more drinks between New Albany and Ball's Crossing, and that Jackson was very disorderly, drinking and using profane language throughout the trip; that Purvis asked Jackson if he (Jackson) was not going to get off at Ball's Crossing, and Jackson said, "Yes"; that they were not ejected or put off, but got off the train of their own accord, and upon their own demand, and that they were going, as they said, to a dance; that both were drunk, Jackson more than Purvis, but that both were able to navigate, and that Purvis asked Newberry to assist Jackson off the train; and, finally, that the witness saw that Jackson was on the ground safely; that he and Purvis were standing on the track—that is, were safely on the ground.

The last thing we desire to say about the testimony is that it is shown distinctly by the testimony of Jackson's son-in-law, Will Mercer, that he himself was a section foreman, and that Jackson was a section hand under him; that Ball's Crossing was in his section, and that Jackson was thoroughly familiar with the location and all the surroundings at Ball's Crossing. This, then, is the case made by the facts, upon which we desire to make a single observation: That, manifestly, the clear preponderance of the testimony is with the appellant company on this record, and that, unless, on a new trial, the plaintiff shall be able to materially strengthen his case, there should be a peremptory instruction to find for the defendant, since no verdict should be allowed to stand on this testimony for damages, either punitive or actual.

But this is not the whole case. When we come to consider the instructions of the court, the confusion only deepens. The plaintiff asked 16 instructions, the first 12 of which unbrokenly were refused. Without burdening this opinion by having all these in-

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structions, refused and given, set out, it is sufficient to observe as to the refused instructions as follows: That running through nearly all of the refused instructions is the proposition that the defendant's conductor put Jackson off—ejected him. All these instructions were properly refused, since there is not a particle of testimony showing that there was any ejection of Jackson. Coming to the instructions given for the plaintiff, two of these, Nos. 15 and 16, are simply as to the right of the jury to judge of the weight of the evidence, etc., and were properly given. The thirteenth instruction for the plaintiff ought not to have been given, because it submits to the jury, as a doubtful question, the question whether the conductor collected Jackson's fare from New Albany to Ecu, when it is plain from the testimony, and so argued by the appellee himself, that Jackson's ticket was found in his pocket after he was drowned; and, secondly, because it also submits to the jury as a fact, doubtful on the testimony, whether the conductor put Jackson off because he had been carried beyond his destination, when the uncontradicted testimony is that Jackson had paid the conductor the cash fare from Ecu to Ball's Crossing, Purvis himself saying that he did not know whether he (Purvis) had paid the cash fare for Jackson, but he had paid his own cash fare. The fourteenth instruction for the plaintiff is also erroneous, because it leaves it to the jury to say whether Jackson had been carried past Ecu, his destination for the same reasons above set out. Of the whole instructions asked for the plaintiff, 16 in number, therefore, only 2 were properly given, and they related only to the right of the jury to determine the weight of the testimony and the credibility of the witnesses.

How was it, now, as to the instructions given for the defendant? The court actually gave the defendant nineteen instructions and refused two, one of the two being a peremptory instruction; and this in a case where a half dozen instructions, at the most, should fully have covered the determining points in the case. Indeed, a half dozen instructions, on either side, would fully and clearly have put the pivotal points in the case. The cloud of instructions could only have had the effect of obscuring the issues that should have been brought out in bold relief by a few crisp, clear charges. We will say, very briefly, in respect to the instructions for the appellant, at this time, just this: That instruction No. 8 was erroneous, since no question should have been submitted to the jury about Jackson's being carried past his destination; and that instruction No. 9, and several others presenting the same principle, is too extreme in its statement of the law as to drunkenness. It is not a correct proposition to say, as instruction No. 9 does, that the jury are not to consider at all the drunkenness of the said Jackson, but that they are to view his acts and doings in the same way and in the same light as they

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would those of a sober man under similar circumstances. How drunk Jackson was at the time he reached Ball's Crossing is a question of fact to be found by the jury; and if the conductor of the train knew that Jackson was drunk to the point of utter insensibility, so that he could neither sit, nor stand, nor walk, and so that, in a word, he was in no way capable of taking care of himself, then said conductor should have dealt with him according to the condition he was then in, and in view of what would reasonably happen to him in such a condition, if left at Ball's Crossing, with the surroundings then and there obtaining. All the charges given for the defendant should have been modified in accordance with the announcement just made. Finally, we observe that instruction No. 17 for the appellant distinctly told the jury that no punitive or exemplary damages could be awarded in the case, and yet instruction No. 18 tells the jury, just as distinctly, that "if you may believe from the evidence in this case that W. H. Jackson was ejected from defendant's train for the nonpayment of fare, the defendant had the right to do this, and unless you believe said ejection was willfully, wantonly, and wrongfully made, you will find your verdict for defendant." In other words, the court told the jury in instruction No. 17 that they could not award any punitive damages, and yet, immediately thereafter, in instruction No. 18, tells them that they must find an absolute verdict for the defendant against all damages unless they believe that there was an ejection willfully and wantonly made. If the jury had obeyed these two instructions, as it was their duty to do, then, manifestly, under instruction No. 17 they could have awarded no punitive damages, and under instruction No. 18 they could have awarded no actual damages. These two instructions, taken together, practically amounted to a peremptory instruction to find for the defendant; and yet the court overruled the motion for a new trial, the jury having awarded \$5,000 damages.

It certainly must be perfectly obvious, now, on this full statement of this record, both as to the facts and the law, that this verdict, on the case as now made, cannot stand. There is no explanation of it, except on two theories—one that they were misled, as they may very probably have been, by the errors in the instructions pointed out; and the other, that the verdict was attributable to prejudice and passion, the result being arbitrarily reached in the face of the law and the evidence. Public service corporations must be held to the very strictest accountability under the law. There must be no relaxation of those principles which give the public the right to demand the best service and the strictest discharge of their duties as public service corporations. On the other hand, no more will it do to tolerate verdicts against them which are manifestly the result of arbitrary action in the

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face of the testimony and the law of the case, whether such result be attributable to erroneous instructions or to prejudice and passion on the part of the jury. The public must be protected in its rights fully, but the public service corporations must also be just as fully protected by the courts of the country in their just rights.

Reversed and remanded.

RILEY v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, April 10, 1908.)

[69 Atl. Rep. 338.]

Carriers — Street Cars — Duty of Carrier — Removal of Snow and Ice.*—It would be unreasonable to require the immediate and continuous removal of all snow and ice from trains during passage, and a passenger cannot assume that the effects of a continuous storm of snow, sleet, or rain will be immediately and effectually removed from the exposed platform of a train between stations.

Same—Injuries to Passengers.*—At the time plaintiff was injured a snow-storm had continued throughout the day, with some rain, and the temperature was below the freezing point. Before starting on the trip the conductor had removed the accumulated ice and snow from the street car steps; but during the trip a considerable mass of ice and snow was deposited on the step by incoming passengers, and plaintiff, in alighting from the car, slipped from the step and was injured. He testified that before stepping down he saw the ice and snow and used due care in alighting. Held, that defendant was not negligent in permitting snow and ice to gather on the steps, as it would be unreasonable to require it to prevent the steps from becoming slippery by the ingress of passengers between stops.

Same—Negligence of Person Injured—Care Required by Passenger.—The prevalence of storm and freezing weather imposes upon a passenger an extra degree of care to prevent injury in alighting from a car.

Exceptions from Superior Court, Providence County.

Action by James P. Riley against the Rhode Island Company. Verdict for defendant, and plaintiff excepts. Exceptions overruled, and cause remanded for judgment upon verdict.

Argued before DOUGLAS, C. J., and DUBOIS, BLOGETT, JOHNSON, and PARKHURST, JJ.

*See extensive note appended to *Herbert v. St. Paul City Ry. Co.* (Minn.), 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152; *Foster v. Old Colony St. Ry. Co.* (Mass.), 6 R. R. R. 894, 29 Am. & Eng. R. Cas., N. S., 894 (liability for injury to alighting passenger caused by failing to sprinkle sand on car steps covered with snow).

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James A. Williams, for plaintiff.

Henry W. Hayes and *Alonso R. Williams*, for defendant.

DOUGLAS, C. J. On the 1st day of March, 1907, the plaintiff, in descending from a street car operated by the defendant, slipped from the step of a car and fell and was injured. A snowstorm had commenced the night before, and with intermissions of rain continued during that day. The average temperature until after the accident was below the freezing point. It appeared in evidence that before starting upon the trip on which the accident occurred the conductor had removed from the step such snow and ice as had accumulated there, but that, after starting from the terminus of the route, ice or snow had been deposited on the step by the feet of incoming passengers, and so remained in considerable mass when the plaintiff placed his foot upon it in alighting. He testifies that before stepping down he saw the snow and ice there, but used due care in descending. Upon these facts the superior court held that no negligence on the part of the defendant had been shown, and directed a verdict for the defendant. To this direction the plaintiff excepted, and the case is before us upon the bill of exceptions based thereon.

We think the verdict was rightly directed. The legal principles affecting the responsibility of a railroad company with respect to the removal of snow and ice from the platform and steps of its cars are well stated in *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 493, 495, 18 N. E. 859, 861, 2 L. R. A. 252, where it is said by Ruger, C. J.: "The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain, or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations, or the termini of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so. * * * It is safe to say that such corporations should not be held responsible for the dangers produced by the elements until they have assumed a dangerous form, and they have had a reasonable opportunity to remove their effects." This case is approved in *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74. In *Fearn v. West Jersey Ferry Co.*, 143 Pa. 122, 128, 22 Atl. 708, 709, 13 L. R. A. 366, the court say: "It is well known that rain or

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snow, falling upon the sidewalks of a town or city, the steps and platform of railway cars, and the decks of ferryboats, will render them slippery, and consequently more difficult to walk upon. But it is not practicable to absolutely prevent this condition while the rain or snow is falling, and the mere existence of it during the storm which causes it raises no presumption of negligence on the part of the municipality, the railway, or ferry company." To the same effect are *Pittsburg, etc., Ry. Co. v. Aldridge*, 27 Ind. App. 498, 61 N. E. 741; *Rusk v. Manhattan Ry. Co.*, 46 App. Div. 100, 61 N. Y. Supp. 384.

The cases cited by the plaintiff do not deny the rule that a railroad company is not responsible for the existence of ice or snow upon the steps of its cars until it has had sufficient time and opportunity consistently with its duty to transport its passengers to remove the accumulation; but they present circumstances where the opportunity to remove the ice or snow was neglected. Thus, in *Foster v. Old Colony Street Railway*, 182 Mass. 378, 280, 65 N. E. 795, the route was short, and there had been a stop of 15 minutes at the terminus, during which it appeared that no effort had been made to remove the snow, and also facilities were shown to have covered the snow or ice with sand, which there was evidence had been neglected. The court say: "The jury were warranted in finding that under the circumstances of this case the defendant could have prevented, and had undertaken to prevent, the open steps of this car from being slippery when the plaintiff alighted from it." In *Gilman v. B. & M. R. R. Co.*, 168 Mass. 454, 47 N. E. 193, it was held that the jury were warranted in finding that the snow and ice were on the steps of the car before it left the station; and the cases of *Palmer v. Pennsylvania Ry. Co.*, 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252, and *Kelly v. Manhattan Ry.*, 112 N. Y. 443, 20 N. E. 283, 3 L. R. A. 74, are distinguished. In *Neslie v. Passenger Railway Co.*, 113 Pa. 300, 6 Atl. 72, the evidence was held sufficient to show that the ice had been allowed to remain from the day before.

In the case at bar we think it would be unreasonable to hold that it was the duty of the defendant corporation to prevent the step from becoming slippery by the ingress of passengers during the passage of the car along its route. In a climate such as ours the effectual performance of such a duty would at times cause serious inconvenience to the traveling public, and during the continuance of a storm would be impossible. The prevalence of stormy weather and a freezing temperature imposes upon a passenger an extra degree of care, which he cannot expect the carrier to save him from. He must bear his share of the burden of "the inconstant year."

The plaintiff's exception is overruled, and the cause is remitted to the superior court for judgment upon the verdict.

BIRMINGHAM RY., LIGHT & POWER CO. v. LEE.

(Supreme Court of Alabama, Dec. 19, 1907.)

[45 So. Rep. 292.]

Pleading—Demurrer—Construction.—A ground of demurrer to a complaint, that the alleged negligence of defendant is not alleged to have been the proximate "result" of the injuries to plaintiff, is wanting in intelligent merit.

Carriers—Injury to Passenger—Negligence—Wantonness—Pleading.—A count of a complaint, alleging that defendant's servant "wantonly and recklessly or intentionally" injured plaintiff, will be held a charge of wantonness and intentional injury.

Same—Contributory Negligence.—A plea setting up contributory negligence, for that "plaintiff negligently boarded or negligently attempted to board said car," is demurrable as too general, because not setting out the manner in which he boarded or attempted to board it.

Same—Wantonness—Evidence.—On the issue of willfulness or wantonness in the injury to plaintiff by the starting of defendant's street car, the evidence tending to show that plaintiff was in the act of boarding the car, that the motorman saw or could with diligence have seen him in such attempt when the car was started, and that the motorman was notified of plaintiff's physical infirmity and his consequent slowness of gait, and was requested by plaintiff's son not to start the car till plaintiff got on, testimony of the motorman that it was the motorman's duty to see that every one ready to get on the car got on before he started was admissible.

Same—Boarding Moving Car—Contributory Negligence.*—It is not always negligence to get on a moving street car, and whether in a particular instance it is, considering the speed of the car and other circumstances, is generally a question for the jury.

Same—Taking up Passengers—Negligence of Motorman.†—The motorman has not done his full duty by ascertaining before he starts the car that no one is in the act of getting on the "platform or steps"; but if a passenger is getting on the car, though simply having hold of the handles thereof, it is his duty not to start.

Same—Instructions.—The crew of a street car, or some of them, being chargeable with the duty of knowing before starting that no one was in the act of boarding or attempting to board the car, defendant street railway company is not entitled to a charge that, if

*See third foot-note appended to *Lexington Ry. Co. v. Herring* (Ky.), 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635; foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727.

†See foot-note appended to *Birmingham Ry., etc., Co. v. Hawkins* (Ala.), 27 R. R. R. 689, 50 Am. & Eng. R. Cas., N. S., 689.

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plaintiff attempted to board its car after it had started and without the knowledge of the crew, he could not recover, as their failure to know that he was in the act of getting on might be negligence.

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Peter Lee against the Birmingham Railway Light & Power Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

The nature of the action and the pleading criticised are sufficiently stated in the opinion of the court. The second count was eliminated, and trial was had on the first, third, fourth, fifth, sixth, seventh, and eighth counts. The first five counts were in simple negligence, and the seventh and eighth in wanton and intentional injury. The first plea was the general issue, and the second plea contributory negligence, in that plaintiff negligently boarded or attempted to board said car while the same was in motion, whereby he fell and was injured. The third plea is sufficiently stated in the opinion. Evidence for plaintiff tended to show that plaintiff and his son were at one of the stations of defendant for the purpose of boarding the car to take passage thereon; that plaintiff was suffering from rheumatism and was not able to move in a hurry; that plaintiff's son notified the motorman of the condition of his father, and asked him not to start the car until his father got on; that several people got on ahead of him, and that when plaintiff caught hold of the handholds of the car on each side of the entrance the motorman was again requested not to start the car until the old man got on. The defendant's evidence tended to show that the plaintiff and his son reached the rear of the car after it had stopped, and as it started away from the station they ran along the length of the car, the son helping the father forward, and attempted to board the front end of the car while the car was in motion, and fell in the attempt, and that the conductor and motorman had no knowledge of their trying to do so.

The following charges were refused to defendant: "(1) If the jury find from the evidence that the plaintiff knowingly attempted to get on defendant's car after it started in motion from the station, plaintiff was guilty of negligence in doing so. (2) It was not the duty of the motorman to do more than ascertain and know before starting the car that no one was in the act of getting on the platform or steps of the car at the time he started it. (3) If the jury find from the evidence that plaintiff attempted to get on defendant's car when he knew it had started from the station and was in motion, then the plaintiff was guilty of negligence in doing so." (4) Affirmative charges as to the seventh count. (5) Affirmative charge as to the eighth count. (6) General affirmative charge. "(7) If the jury find from the evidence

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that plaintiff attempted to board defendant's car after it had started from the station and without the knowledge of the crew on the car, the jury must find a verdict for defendant. (8) If the jury find from the evidence that plaintiff, in attempting to get on the car after it started from the station, fell and was injured without the knowledge of the crew, they must find for defendant." The other charges are affirmative charges on the other counts.

Tillman, Grubb, Bradley & Morrow, for appellant.
B. M. Allen, for appellee.

HARALSON, J. Demurrers to the first, third, fourth, and fifth counts were sustained, and these were afterwards amended and demurrers overruled.

The first assignment of error is, "that the alleged negligence of defendant is not alleged to have been the proximate result of the injuries to the plaintiff." The ground of demurrer—the only one insisted on—is wanting in intelligent merit, and it cannot be contended, that the negligence of the defendant "resulted" from the injuries to the plaintiff. If the averment had been, that the injuries of the plaintiff were not alleged to have been the proximate result of the negligence of defendant, the different and intelligent proposition would have been presented. The ground of demurrer, therefore, is, without consequence.

The seventh count avers that a servant or employee of defendant, whose name is unknown to the plaintiff, who had charge or control of said car, wantonly and recklessly or intentionally," are general averments of wantonness and intentional injury, which were sufficient averments thereof. *Armstrong v. Railroad*, 123 Ala. 244, 26 South. 349. The word, "recklessly," as employed in connection with the others, is to be taken as expressing the same idea, or giving color to the wantonness alleged. *A. G. S. R. R. Co. v. Williams*, 140 Ala. 237, 37 South. 255. If the count had averred that the act was done wantonly or recklessly, we would have had mere recklessness joined in the same count with wantonness or intentional injury of plaintiff, which could not be done. *L. & N. R. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35. The count was sufficient. *M. & O. R. R. Co. v. George*, 94 Ala. 216, 10 South. 145.

A demurrer was sustained to defendant's third plea, because the averment was too general. The plea sets up plaintiff's contributory negligence, for that, "plaintiff negligently boarded or negligently attempted to board said car." It should have set out the manner in which he boarded or attempted to board the car. Whether a person is guilty of contributory negligence in getting on a slowly moving train, is a question for the jury and not a question of law for the court. *B. R. L. & P. Co. v. Willis*, 143 Ala. 220, 38 South. 1016. Furthermore, defendant had the bene-

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fit, under its second plea, of whatever defence it could have claimed under the third plea.

Dorrroughs, a witness for defendant, who was the motorman on the car, was asked by the plaintiff on the cross: "Don't you know it is your duty to see that every body there, ready to get on the car, gets on before you start?" The defendant objected to the question, but assigned no grounds of objection. The witness replied that such was the duty of the motorman. Willfulness or wantonness was charged, and the evidence tended to show that plaintiff was in the act of boarding the train, and the motorman saw or could, with diligence, have seen, him in such an attempt, when he started his car. It further tends to show, that the motorman was actually notified of plaintiff's physical infirmity and his consequent slowness of gait; and was requested by the son of plaintiff not to start the car until the plaintiff could get in. *M. & E. R. R. Co. v. Stewart*, 91 Ala. 422, 8 South. 708.

The first charge for defendant was properly refused. It is not always negligence for one to get on a moving car. It is owing to its speed and other considerations, and is a question generally for the jury to decide under all the evidence, and not a matter of law for the court. *M. & E. R. R. Co. v. Stewart*, 91 Ala. 424, 8 South. 708; *C. R. & B. Co. v. Miles*, 88 Ala. 256, 6 South. 696; *H. A. & B. R. R. Co. v. Burt*, 92 Ala. 294, 9 South. 410, 13 L. R. A. 95.

The second charge was faulty. It limits the duty of the motorman to ascertain and know that before he started the car, no one was in the act of getting on the platform or steps of the car at the time he started it. If the passenger was in the act of getting on the car, even though he was not on the platform or steps, but simply had hold of the handles of the car, as the evidence tends to show was the case with the plaintiff, the duty not to start the car was on the motorman to observe.

For like reasons, and from others that have appeared, the third charge was properly refused.

The fourth was the general charge on the seventh count of the complaint. We have already passed on that count and held it to be good. The evidence tended to sustain it.

The other affirmative charges for defendant were properly refused.

The seventh charge was also properly refused. The failure of the crew to know that plaintiff was in the act of getting on, might be negligence of which the defendant could not avail itself, since the crew or some of them, were chargeable with the duty of knowing that no one was in the act of boarding or attempting to board the car before starting.

It was for the jury to determine whether the passenger acted as a reasonably cautious and prudent person would act, under

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like circumstances. *Watkins v. B. R. & E. Co.*, 120 Ala. 152, 24 South. 392, 43 L. R. A. 297.

We find no error in the record and the judgment below is affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

STATE v. MARTYN.

(Supreme Court of Nebraska, Sept. 16, 1908.)

[117 N. W. Rep. 719.]

Carriers—Regulation—Prohibition of Free Transportation.—A contract between a railroad company and a physician, by the terms of which he is to receive for professional services to be rendered by him for the company, at its request, the sum of \$25 per month and an annual pass over its lines of road, where the physician does not spend a major portion of his time in the employment of the company, is prohibited by the provisions of sections 10,664, 10,665, Cobbey's St. 1907, and the acceptance and use of such a pass by the physician renders him guilty of a violation of those sections.

Constitutional Law—Police Power—Unjust Discrimination—Regulation of Carriers.*—The provisions of chapter 93, p. 342, Laws 1907, commonly called the "Anti-Pass Law," prohibiting the issuance, acceptance, and use of free transportation, are a proper and reasonable exercise of the police power of the state, and the power of the Legislature to regulate the business of common carriers by preventing unjust discriminations, and are not unconstitutional.

(Syllabus by the Court.)

Appeal from District Court, Platte County; Thomas, Judge.

Information against David T. Martyn for accepting a pass in violation of law. Judgment for defendant, and the state appeals. Exceptions of state sustained.

W. N. Hensley, John J. Sullivan, and Wm. T. Thompson, for the State.

W. M. Cornelius, Edson Rich, and J. E. Rait, for appellee.

*For the authorities in this series on the subject of the police powers of a state over railroad companies, see second foot-note appended to *Railroad Com'rs v. Atlantic C. L. R. Co. (S. Car.)*, 17 R. R. R. 505, 40 Am. & Eng. R. Cas., N. S., 505, where all those preceding it are collected; last foot-note appended to *Cincinnati, etc., Ry. Co. v. Commonwealth (Ky.)*, 27 R. R. R. 616, 50 Am. & Eng. R. Cas., N. S., 616; second foot-note appended to *Pittsburg, etc., Ry. Co. v. Hartford (Ind.)*, 27 R. R. R. 82, 50 Am. & Eng. R. Cas., N. S., 82; last foot-note appended to *Osteen v. Southern Ry. (S. Car.)*, 25 R. R. R. 300, 48 Am. & Eng. R. Cas., N. S., 300.

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BARNES, C. J. At the March, A. D. 1908, term of the district court of Platte county, an information was filed against the defendant, David T. Martyn, Sr., which, omitting the title and formal parts, was, in substance, as follows: That on or about the 15th day of January, 1908, David T. Martyn, Sr., then and there being, did unlawfully accept from the Union Pacific Railroad Company, a corporation owning and operating lines of railroad in the state of Nebraska, a free pass for travel on and over all the lines of railroad owned and operated by the said Union Pacific Railroad Company in said state; and did then and there unlawfully use said pass for the free transportation of himself as a passenger on and over the said lines of railroad in said county and state; that said David T. Martyn, Sr., not being then and there an officer, agent, or bona fide employee, the major portion of whose time is or was devoted to the service of said railroad company. The information in conclusion also stated facts sufficient to show that the defendant was not included within any of the exceptions contained in chapter 93, p. 342, Laws 1907, commonly called the "Anti-Pass Law." To this information the defendant entered a plea of not guilty. In due time he was placed on trial, and the cause was finally submitted on the contract, under which the pass in question was issued and an agreed statement of facts. It was provided, among other things, by said contract that the defendant should furnish all necessary surgical and medical treatment to the sick and injured employees of the Union Pacific Railroad Company free of charge to said employees, and also render such services to passengers and others, for whom the company should request the same, between Schuyler and Silver Creek, Neb., for which he was to receive an annual pass on the Nebraska Division of said railroad, together with trip passes upon other divisions thereof, and \$25 per month during his employment, which it was provided could be canceled and terminated at any time for cause by the said company. By the agreed statement of facts, it was conceded, among other things, that the defendant was, and is not, employed a major portion of his time in the service of the said railroad company. On motion of the defendant's counsel the court directed the jury to return a verdict of not guilty, which was accordingly done, the defendant was discharged, and the cause was thereupon dismissed, to all of which the state entered its exceptions, and has brought the case here for review under the provisions of sections 483 and 515 of the Criminal Code. It is contended by the state that the record shows beyond any question or chance of reasonable contention that defendant was guilty of a plain violation of our statutes prohibiting the acceptance and use of free transportation. On the other hand, defendant contends, first, that a pass issued in good faith to a regular practicing physician in return for services per-

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formed and to be performed by him in the treatment of persons injured on or about the railroad issuing it is not a free pass within the meaning of the act of March 30, 1907, prohibiting the giving, acceptance, and use of passes, or free transportation of passengers over any and all lines of railroad within this state; second, that the act violates section 3, art. 1, Const., which provides that "no person shall be deprived of life, liberty or property without due process of law"; and, third, that the act violates section 16 of article 1 of the Constitution, which provides that "no bill of attainder ex post facto law or law impairing the obligation of contracts, or making any irrevocable grant of special privileges shall be passed."

To determine these questions, it is not only proper, but necessary, for us to consider all of the several provisions of our statutes relating to, or in any manner regulating, the business of common carriers within this state; and we should also take into consideration the evil sought to be corrected by the several legislative acts on that subject, together with the means adopted to accomplish that purpose. It is a matter of common knowledge that free passes first originated in favors granted to personal friends of railroad officials, and that this courtesy was gradually extended to public officers. This in itself, and in its inception, was not considered harmful or detrimental to the public welfare; but long prior to the passage of the act in question the giving, acceptance, and use of the free pass had become an intolerable evil, a menace to good government, and a stumbling block in the way of securing needed legislation, as well as a burden to the railroad companies themselves. With this situation confronting the legislative assembly of 1907, that body wisely determined to put an end to the whole matter, and so it first enacted chapter 90, p. 311, Sess. Laws 1907, commonly called the "Railway Commission Act," which was approved by the Governor, and became a law on the 27th day of March of that year. By section 14 of the act it was provided that: "If any railway company or common carrier subject to the provisions of this act, directly or indirectly, through or by its agents, officers or employees, by any special rate, rebate, draw-back, or other device shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, the same shall constitute an unjust discrimination, which is hereby forbidden and declared to be unlawful." It seems perfectly clear that the giving of free transportation to any person whomsoever was thereby made unlawful; and, while it was not made a penal offense by that section to receive such transportation, yet the giving of it was made a crime punishable by a fine of not less than

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\$500 nor more than \$1,000. That the provisions of that section are broad enough to cover the transaction in question in this case, and render it at least unlawful, there can be no doubt, for the transportation of a passenger by a railroad company over its line of road is a service performed by it for such passenger; and the Union Pacific Railroad Company by giving the defendant the pass in question thus charged, collected, demanded, and received a different charge from the defendant than it charged, demanded, collected, or received from other persons or passengers for a like service. That this rendered the transaction unlawful there can be no question. To the operation of this law there was no exception, and the servants and employees of the railroad company could not be transported free even while carrying out the terms of their employment. It was therefore apparent that the law, as it then stood, was too drastic in its provisions, and that there should be enacted some needed exceptions to its operation; and so the anti-pass law above mentioned was passed, approved by the Governor, and took effect on the 30th day of March, 1907. See sections 10,664, 10,665, Cobbey's St. 1907. By this act it was made a penal offense, not only for a railroad company to give, but for any person to receive and use, free transportation who was not especially excepted from its operation by the language of the act itself. As we understand the question before us, it is not claimed by the defendant that he falls within any of those exceptions, and while the defendant was an employee of the Union Pacific Railroad Company, yet it is frankly conceded that he did not, and does not, spend a major portion of his time in the service of that company. With the facts above stated before us, we come now to determine the foregoing questions.

The defendant's first contention is that his pass is not a free pass within the meaning of the statute above referred to. To support this proposition, his counsel cite *Dempsey v. N. Y. & H. R. Co.*, 146 N. Y. 292, 40 N. E. 867. In that case one Dempsey, a railroad policeman, appointed by the Governor of the state of New York, pursuant to statute, had entered into a contract with the defendant railroad to protect its property, and be ready for such service at all times on demand; and it was also agreed that, if he would procure his appointment to the office of railroad policeman, the company would give him \$75 per month for performing the duties of that office, together with an annual pass, which was required to enable him to perform his official duties. Upon these facts it was held that the pass contracted for was not a free pass within the meaning of the Constitution of New York, which prohibited the issuance of free passes to the public officers of that state. It thus appears that the rule announced therein has no application to the case at bar.

Our attention is next directed to the opinion of the Attorney

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General of the state of Wisconsin, wherein he decided that a contract between the Assistant Attorney General and a railway company, by which that officer was to act as attorney for the company in consideration of an annual pass, was not a violation of the anti-pass law of that state. An examination of that opinion, however, discloses that it was based on *Dempsey v. Railway Co.*, *supra*, and therefore has no application to the facts here in question, or the law by which our decision must be governed. Again, the obvious impropriety of the employment of the assistant law officer of the state by a railroad company, and the inconsistency of his position in accepting such employment, affords sufficient reason to justify us in declining to follow that opinion.

Finally, on this branch of the case, counsel present *Smith v. N. Y. Cent. R. Co.*, 24 N. Y. 222, and *Railroad Co. v. Lockwood*, 84 U. S. 359, 21 L. Ed. 627. We find upon an examination of those cases that the point decided by each of them was that a shipper, traveling on a drover's pass issued to enable him to take care of his live stock en route, was not a gratuitous passenger in such a sense as to relieve the carrier from liability for negligently causing his death. Just how those cases can aid us in determining the questions under consideration we are not now advised, and so far have been unable to ascertain. On the other hand, we find that in *Marshall v. Nashville R. & L. Co.*, 118 Tenn. 254, 101 S. W. 419, 9 L. R. A. (N. S.) 1249, the nature of a free pass issued by a railroad company to the chief of police of the city of Nashville was determined, and it was there said: "One of the assignments of error in this case is that the pass was not a mere gratuity, but that it was given for a valuable consideration; and, in this connection, it is said that the deceased was a member of the police force of Nashville, being chief of detectives, and that to this class of persons the company, as a rule, issued passes which were based upon a valuable consideration. In other words, this pass was given, like others of its class, to encourage and to induce members of the police force, like the intestate, to ride upon the cars, and to be frequently about them, because, their presence tended to preserve peace and good order for the passengers, and to protect the interest and operation of the road. We are of opinion that such a motive on the part of the road cannot be considered as a valuable consideration, because the expected benefits are too remote, contingent, and uncertain to be so classed; and the pass must, therefore, be considered and treated, as it purports to be, a mere gratuity or compliment." An examination of the contract under which the pass in question was issued to the defendant discloses, as above stated, that it could be abrogated or annulled at any time for cause, and the impression is created thereby and by the whole record that for the contingent services which the defendant was to render to the

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Union Pacific Railroad Company, if requested, he was to receive and accept \$25 per month, and that the pass in question by which he was permitted to ride upon the trains of that company over its Nebraska division, free of charge, was a mere gratuity, and was so considered by both the defendant and the railroad company until after the passage of the act in question herein. It seems quite evident that any expected benefits by reason thereof which might be received by the railroad company were so remote and contingent as to constitute no consideration therefor. If the defendant's pass is not a free pass within the meaning of the act, which is the basis of this prosecution, then the statute itself is as useless as the vermiform appendix. If a free pass can be lawfully issued by a railroad company and used by any person as an employee who does not spend a major portion of his time in the service of the company, the whole purpose of the law is thwarted and destroyed, for under the pretext of employment any service performed for the company, however slight and trifling, would entitle the one performing it to free transportation, and the law would thus be rendered wholly nugatory. We therefore decline to adopt the construction contended for, and are of the opinion that the defendant's pass is just what it purports to be, a free pass, and its issuance, acceptance, and use was a plain violation of the statute, which is the basis of this prosecution.

We come now to dispose of the defendant's second and third contentions, which strike at the constitutionality of the law involved in this controversy. These questions will be considered together, for what may be said as to one of them applies with equal force to the other. It is asserted that the anti-pass law is unconstitutional because it impairs the obligations of the contract existing between the defendant and the railroad company, and deprives defendant of his property without due process of law. To correctly decide this question, we should construe all of the provisions of our Constitution and statutes which relate to, or have any bearing thereon, together. By section 7 of article 11 of the Constitution it is provided that "the Legislature shall pass laws to correct abuses and prevent unjust discriminations, and extortions in all charges of express, telegraph, and railroad companies in this state and enforce such laws by adequate penalties." It thus appears that the power to regulate intrastate commerce and prevent unjust discriminations is not only granted to the legislative assembly by the Constitution, but it is thereby made a duty which the lawmaking body is commanded to perform. It is also well settled that the internal commerce of a state—that is, the commerce wholly confined to and carried on within the limits of a single state—is as much under state control as foreign or interstate commerce is under the control of the general government. *Sands v. Manistee River Imp. Co.*, 123 U. S. 293, 8 Sup.

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Ct. 113, 31 L. Ed. 149; *Gibbons v. Ogden*, 9 Wheat. 19, 6 L. Ed. 23; *Moore v. American Trans. Co.*, 24 How. 39, 16 L. Ed. 674; *Cincinnati Bridge Co. v. Ky.*, 154 U. S. 210, 14 Sup. Ct. 1087, 38 L. Ed. 962; *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793. The exercise of this power necessarily includes the right to interfere with contract and property rights, so far, at least, as may be necessary to prevent extortion and discrimination. From even a cursory examination of the several acts of our Legislature on this subject, it is quite apparent that the contract under consideration was, and is, discriminatory in its nature. We find that like contracts have been frequently declared to be so. The statutes of North Carolina upon this subject are the same as our own, and in *McNeill v. Durham & C. R. Co.*, 132 N. C. 510, 44 S. E. 34, 67 L. R. A. 227, 95 Am. St. Rep. 641, it was held that a contract between a railroad company and the publisher of a newspaper by which he was to publish the time-tables of the company and receive a pass over its line of railroad, as compensation therefor, was invalid and was an illegal discrimination. In the opinion in that case we find the following: "Subject to the liberal exceptions just recited, the General Assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine 'not less than one thousand dollars and not exceeding five thousand dollars for each offense.' Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit: That for the year previous he had advertised the schedule of the defendant company in his paper, and had received therefore a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rate as would be charged another, but, let it be what it may, it could not amount exactly, 'neither more nor less,' to the value of a free pass to travel ad libitum an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit and not payable in money." This decision not only meets with our approval, but we find that the federal courts in construing like provisions of the interstate commerce law have reached a similar conclusion. *United States v. Wells Fargo Express Co.* (C. C.) 161 Fed. 606. Again, it may be said if the contract for the pass, in the case at bar, ever had any validity, the provisions of our Constitution, above quoted, entered into and became a part of it at its inception. And its terms and obligations were at all times subject to the power of the Legislature to pass laws "to correct abuses and prevent unjust discriminations." Therefore, when the law in question took effect, the contract be-

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came illegal, and its obligations gave way and were suspended, for it cannot be said that it was of such a character as to suspend the provisions of the Constitution, and the statute passed in response to the command of that instrument.

It may be further stated that our anti-pass law is simply a police regulation, adopted in pursuance to the mandates of the supreme law, and therefore cannot be said to be unconstitutional. In *Tiedman on Limitations of Police Power* it is well said: "Whenever the business is itself a privilege or franchise, not enjoyed by all alike, or the business is materially benefited by the gift of the state of some special privileges to be enjoyed in connection with it, the business ceases to be strictly private, and becomes a quasi public business, and to that extent may be subjected to police regulation." That such is the nature of the business of a common carrier there can be no doubt. In *Bullard v. Northern Pac. R. R. Co.*, 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246, it was held that existing contracts for special freight rates or rebates from regular tariff rates which had been made with railroad companies subject to the interstate commerce act became illegal when that act took effect, and were after that time incapable of enforcement. The contract in question herein is without doubt subject to the same rule. We are therefore of opinion that the issuance of the defendant's annual pass, and its acceptance and use by him, was a plain violation of the statute.

We are therefore constrained to hold that the district court erred in directing the jury to find the defendant not guilty, and discharging him from further prosecution. For the foregoing reasons, the exceptions of the state are sustained. Judgment accordingly.

PAUL *v.* SALT LAKE CITY R. CO.

(Supreme Court of Utah, April 8, 1908.)

[95 Pac. Rep. 363.]

Carriers—Action for Injury to Passenger—Res Ipsa Loquitur.*—A recovery against a carrier under the rule *res ipsa loquitur* cannot be had by merely showing that an accident occurred and that an injury was sustained by a passenger, but it must further appear that the injury was caused by something which, at the time it occurred, was in the care, custody, or under the control of the carrier, or in some way connected with or related to his business in the transportation of passengers, and while there is no presumption that the particular things that caused the injury actually existed, if there is some competent evidence showing their existence and the occurrence of the accident caused by any one of them and the resulting injury, the law will presume that the accident was the result of the carrier's negligence, and the burden of proof is on it to show that it was not at fault.

Same—Application of Rule Res Ipsa Loquitur.*—The rule *res ipsa loquitur* applies to the operation of street cars and to all passengers alike whether injured while riding in a car or in getting on or off.

New Trial—Grounds—Misconduct Affecting Jury—Misconduct of President of Defendant Corporation.—An affidavit supporting a motion for a new trial averred on information and belief that the president of defendant corporation was also the president, prophet, seer, and revelator of the Church of Jesus Christ of Latter-Day Saints, and at a secret priesthood meeting before the trial instructed his followers as to their duties if called upon to serve as jurors in cases against corporations, and especially street railway corporations, and stated that there were grafters seeking by trickery to obtain verdicts against corporations by means of damage suits, and that he regretted that Latter-Day Saints sitting as jurors had returned verdicts against corporations. The affidavit further averred that five of the jurors trying the case were members of the Church of Later-Day Saints. It was not claimed that any of the jurors were present at the meeting or ever heard of what was alleged to have been said by the president of the church. Held, that the affidavit was insufficient, especially where the jurors assailed filed counter affidavits in which they denied knowledge of the alleged instructions by the president of the church, and alleged that they had never heard of them until informed of them

*See second foot-note appended to *Chaffe v. Consolidated Ry. Co.* (Mass.), 27 R. R. R. 706, 50 Am. & Eng. R. Cas., N. S., 706; *O'Gara v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 333, 50 Am. & Eng. R. Cas., N. S., 333; foot-note appended to *Cincinnati Traction Co. v. Holzenkamp* (Ohio), 25 R. R. R. 553, 48 Am. & Eng. R. Cas., N. S., 553; foot-notes appended to *Pennsylvania R. Co. v. McCaffrey* (C. C. A.), 23 R. R. R. 23, 46 Am. & Eng. R. Cas., N. S., 23.

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by the affidavit, since in order to constitute misconduct which would affect a regularly returned verdict, it must in some way be made clearly apparent that the acts complained of reached the jurors or some of them.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Personal injury action by Louisa B. Paul against the Salt Lake City Railroad Company. Judgment for defendant and plaintiff appeals. Affirmed.

S. P. Armstrong, for appellant.

P. L. Williams, for respondent.

FRICK, J. This is the second appeal of this case. The opinion on the first appeal is reported in 30 Utah, 41, 83 Pac. 563, where judgment in favor of respondent was reversed upon the ground that the court committed error in its instructions to the jury. The facts developed on the second trial are practically the same as on the first, and they now appear to be as stated by Mr. Justice Straup on the former appeal.

The principal matters presented for review on this appeal, so far as they relate to the trial, involve the questions of contributory negligence on the part of appellant in alighting from a street car on which she was a passenger which was being operated by respondent, and the presumptions of negligence arising against the respondent by reason of the occurrence of the accident and injury to appellant. The court's instructions were very full and cover every phase of the case. Among other instructions, the court gave the following: "The mere fact that an accident has happened is not sufficient proof to charge the defendant with negligence nor the plaintiff with contributory negligence. The burden of proving negligence rests on the party alleging it, and when a person charges negligence on the part of another as a cause of action she must prove the negligence by a preponderance of the evidence. While the mere fact that an accident has happened is not sufficient proof to charge the defendant with negligence, yet, in this case, the court instructs you that if you find from the evidence that while plaintiff was a passenger on defendant's street car, and while she was attempting to alight therefrom, she was injured by the car starting and jerking her to the ground, the fact, if you find it to be a fact, that she was injured by such starting and jerking of the car constitutes prima facie evidence of negligence on the part of defendant, and casts on the defendant the burden of showing that such starting took place without its fault, or that the injury occurred through the contributory negligence of the plaintiff. But the court instructs you that the burden of showing that she was injured by reason of

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such starting of the car is on the plaintiff, and there is no presumption from the mere fact that she was injured that the car was not in motion when she attempted to alight, nor is there any presumption that the car was in motion when she attempted to alight from the mere fact of the injury. Whether or not the car was in motion is a fact that you must determine from the evidence." Appellant excepted to certain portions of this instruction and now urges the giving of these parts as error.

On the former appeal we announced the following doctrine: That respondent had made out a *prima facie* case upon proving that she was a passenger on one of appellant's cars. That she had indicated her desire to leave it, and that the car was stopped to enable her to do so. That while in the act of alighting and before she had done so the car started and caused her to fall. We further held that the instructions of the court were not in harmony with this doctrine, but in conflict therewith, and hence held the instructions erroneous. Counsel for appellant now asserts that the foregoing instruction in its effect is practically the same as the one condemned by this court and hence likewise erroneous. Counsel, as we understand him, contends the law as between carrier and passenger to be that, if an accident of any kind occurs, or, if a passenger is found injured or dead by the side of the track, or in a railway car, all that the plaintiff is required to prove is that the injured or deceased person was a passenger, and that while sustaining that relation was injured or killed. From such an injury or death it is contended the presumption arises that the passenger was injured or killed through the negligence of the carrier and the burden is cast upon him to explain the cause of the injury or death and thus purge himself of negligence. This, counsel says, is the necessary result of the application of the maxim "*res ipsa loquitur*." Is this contention sound? We think not. It is quite true that, as between carrier and passenger, the maxim applies in most instances. But it does not go to the extent contended for by counsel. We have very recently had occasion to consider and pass upon the application of the maxim as applied to carrier and passenger in the case of *Dearden v. S. P., L. A. & S. L. R. Co.* (Utah) 93 Pac. 271. Mr. Justice Straup, in that case, at page 273, states the rule in the following language: "All that the plaintiff here was required to aver and prove to entitle him to recover was the relation of passenger and carrier; that the accident through which he received his injuries was connected with the means or instrumentality used by the defendant in the transportation, and an injury resulting therefrom. When such facts were shown, a *prima facie* presumption arose that the accident was occasioned by the defendant's negligence, and the burden was cast on it to show that it was not at fault, and that the accident was not caused

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by its negligence." This, we think, is a correct statement of the rule, as it is held to be by the great weight of authority.

In *Price v. St. L., I. M. & S. Ry. Co.*, 75 Ark., at page 491, 88 S. W., at page 578 (second column) 112 Am. St. Rep. 79, the Supreme Court of Arkansas adopts and quotes the following language which is termed to be the true rule: "The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury." A large number of cases are cited which, it is claimed, support the text as quoted above. Under the rule, therefore, to show merely that an accident occurred, and that an injury was sustained by a passenger is not enough. It must further be made to appear that the injury was caused by something which, at the time it occurred, was in the care, custody, or under the control of the carrier, or in some way connected with or related to his business in the transportation of passengers. If one train collides with another, or if the train breaks through a bridge or culvert, or if it collides with some foreign object on the track, or is derailed, in all such cases, as between carrier and passenger, the rule is of easy application, and is generally enforced to its full extent. But if it is alleged that an accident has happened to a passenger through an alleged derailment of a car, or by a collision with some train or other object on the track, or from any other cause, there is no presumption that the collision actually occurred, or that the particular thing that caused the accident actually existed. These must be proved. But if some competent evidence is adduced in support of the existence of the things enumerated, or any one of them, and of the occurrence and the accident caused by any one of them, and the resulting injury, then the law presumes that by the exercise of that high degree of care which it imposes upon common carriers the accident could have been averted, hence casts the burden on the carrier to show why it was not avoided.

Applying the rule to this case, there was no presumption that the car moved when the appellant alighted therefrom; but if it did move while she was in the act of alighting, the law presumes it was caused to move by the negligence of respondent's employees in charge of the car. It is sometimes held that in cases where injuries arise by reason of the alleged movement of a car while a passenger is in the act of stepping onto or in alighting therefrom, the question of whose negligence caused the accident may not always be free from doubt; that in such a case the passenger

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is also engaged in an act which requires the exercise of ordinary care for his own safety; that the act of the carrier in moving the car and the act of the passenger in getting on or off may thus combine to produce the result, and that the injury, if it arises from a fall under such circumstances, may thus as plausibly be attributed to the act of the passenger as to that of the carrier. It is for this reason that some very respectable courts have denied the application of the maxim "*res ipsa loquitur*" in cases of injuries which occur in attempting to get on or off street cars. The exception to the rule is well stated in the case of *Dresslar v. Citizens' St. Ry. Co.*, 19 Ind. App. 383, 47 N. E. 651. It seems to us, however, that this exception is not logical; at least in those jurisdictions where the plaintiff is not required to allege and prove affirmatively that he was in the exercise of ordinary care at the time of the injury. In Indiana and some other states where such affirmative allegations and proof are required, it may well be that where it appears from the complaint that the person was injured while in the act of alighting from a car, the proof required from the plaintiff that he was in the exercise of ordinary care at the time raises an inference rather than a presumption that the accident and consequent injury was caused by the negligence of the carrier. We think, however, that the weight of authority is in accordance with the rule as announced in this case on the former appeal, namely, that it applies to the operation of street cars and to all passengers alike whether injured while riding in a car or in getting on or off. A plaintiff may, by his own testimony, or by that of his witnesses, entirely overcome the presumption, or leave the proximate cause of his injury, by reason of his own conduct, in such a state of doubt that the jury may be warranted in finding against him on the case as made by himself. We have carefully examined all the cases cited by counsel in support of his contention, and none of them goes to the extent that counsel claims. While in some of them general expressions are found that would seem to support counsel, still it is very clear that upon the facts stated, the decisions all rest upon the principles that we have attempted to outline above and are in harmony with it. We think the court gave to appellant every benefit of the maxim "*res ipsa loquitur*," and therefore committed no error in giving the instruction.

Complaint is also made of the giving of instructions Nos. 19 and 20. These instructions were, however, based upon some issue in the case, and correctly stated the law applicable thereto.

The only other assignment that requires consideration relates to the alleged misconduct of the president of respondent. The verdict was returned on April 26, 1906, and just two months thereafter appellant's counsel asked and obtained leave of the court to amend his notice of motion for a new trial and to support such

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amendment by affidavit. The affidavit is made by counsel, and, in substance, states: That, subsequent to the trial, affiant learned of certain interferences by the president of respondent which tended to pervert the course of justice and prevented plaintiff from having a fair trial. That Joseph F. Smith was, at all times stated in the affidavit, the president of respondent and also the president, prophet, seer, and revelator of the Church of Jesus Christ of Latter-Day Saints, a religious organization with a large membership in Salt Lake City and county. Affiant, on information and belief, states that one of the cardinal doctrines of said church is obedience to the teachings, utterances, and instructions of its prophet, seer, and revelator; that affiant is informed and believes that the said Joseph F. Smith, the president of said church and of respondent, at a secret priesthood meeting held at the Tabernacle in Salt Lake City on the evening of April 7, 1906, took occasion to instruct his religious followers as to their duties if called upon to serve as jurors in the trial of cases against corporations, and particularly street railway corporations, and that he stated, in substance, "that there were grafters in the country seeking by every possible trick to secure verdicts against corporations by means of damage suits; that people would step off street cars and pretend to fall or suffer injuries which did not exist, and lawyers would take such personal injury cases and by trickery secure verdicts against corporations. He further stated that he regretted that Latter-Day Saints, sitting as jurors, have returned verdicts against corporations." It is further stated that if the utterances were not direct instructions to his followers to refuse to return verdicts against corporations, the purport thereof "was at least an inducement that they, as jurors, should look with great suspicion on suits against corporations." Affiant proceeds further to state the reasons why he cannot state the foregoing matters positively, and that five of the jurors trying this case are members of, and one of them an official in, such church.

It will be observed that there is not a single fact stated positively, nor is it claimed that any one of the jurors was present at the meeting or ever heard of what it is alleged was said by the president of the church. The claims made in this affidavit—and it was the only one filed—were manifestly insufficient to warrant the granting of a new trial. If verdicts should be set aside upon such statements made merely upon information, and which in no way connect the jurors or any of them with the alleged misconduct and things set forth, then but few if any verdicts would be permitted to stand. Courts in this regard follow strictly the policy of the law, which in every possible way guards the purity of the jury box from undue influence and contamination. Every party who attempts to or does tamper with the jury does so at his peril, and if established he may not be heard to say that what he did had no effect upon the verdict. But, in order to constitute mis-

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conduct so as to affect a regularly returned verdict, it must in some way be made clearly apparent that the act or acts complained of reached the jurors or some of them. If we assume in this case that the president of respondent, as president of the church, said all that counsel states he said, how could it have influenced or in any way affected any one who did not hear of it or was not aware of what, if anything, had been said? Is it to be presumed that simply because a juror is a member of a certain religious organization and believes in its doctrines and tenets, therefore a court can assume that he hears and knows of all matters that may be said by any official of the organization upon any and all subjects, and further assume that he would follow and be controlled by what such official may have said of which the juror is supposed to be informed constructively merely? The things attributed to Mr. Smith he had a right to say at any proper time and place if he believed them to be true, or if he had any reason to believe them so. He had no right however to mention such matter to a juror, nor to any person who might become such, either for the purpose of influencing his judgment, or for any purpose. If he had discussed such matters in the presence of jurors the law would not permit him to say that he did not thereby intend to influence their judgment, but would require him to bear the consequences his acts may have produced. It is not alleged nor shown by any evidence that Mr. Smith did any of these things. The claim is based upon the theory merely that the expressed wish or desire of the president of the church, upon all subjects, will be implicitly followed by all of the members of the church. If we assume this to be so in so far as it pertained to matters of religious doctrine, nevertheless it cannot also be assumed that it is true with regard to all other matters. Indeed it is a matter of universal knowledge that in matters such as are set forth in the affidavit, the effect upon the ordinary layman would be to arouse his opposition to them rather than cause him to meekly comply therewith. But apart from all this, the jurors who were assailed filed counter affidavits in which they denied all knowledge of the alleged instructions by the president of the church, and alleged that they never had heard of them before their attention was directed to them by the affidavit of affiant. The trial court therefore had positive and competent proof before him that the alleged misconduct never reached the jurors or any of them, and hence would not have affected their verdict. All of the cases cited by counsel for appellant upon this point to support his contention in this case rather manifest and make clear that the misconduct which affects a verdict must in some way reach the jurors or some of them. It may consist in what is termed "packing" the jury, or it may be by circulating papers or other documents to influence them, or by extending special courtesies to some of them, or by direct communication with one or more of their number.

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It must however affect a juror who sits in the case or some one who may act as a juror in a particular case. The principles involved here are fully discussed in Thompson & Merriam on Jurors in chapter 21, where the rule we have stated above is fully sustained by the authorities. Any other rule would destroy the integrity of verdicts and make a mere farce of jury trial. If all matters that may be published in a newspaper, or that may be said by men in authority at any time or place about courts, litigants, and the matters in litigation are to be presumed as having influenced or controlled verdicts, then no verdict in any case of any public interest can be permitted to stand. In all such cases a showing, perhaps much stronger than the one in this case, could be made that somebody who in some way is related to the case or to a juror has said or published something which may have influenced him or some of the jurors sitting in the case. The court was clearly right in refusing a new trial upon this ground.

The judgment is affirmed, with costs to respondent.

McCARTY, C. J., and STRAUP, J., concur.

MEHALEK v. MINNEAPOLIS, ST. P. & S. S. M. Ry. Co.

(Supreme Court of Minnesota, July 17, 1908.)

[117 N. W. Rep. 250.]

Carriers—Invitation to Ride—Acquiescence of Employees.*—An invitation by implication to ride on freight trains is not sustained by omission of the flagman and trainmen to pursue and drive away boys who attempt to steal a ride while the train is passing a street crossing.

Railroads—Negligence—Proximate Cause—Failure to Construct Gates.—It conclusively appears from the evidence that the omission by respondent company to construct gates at a street crossing in accordance with the requirements of a city ordinance was not the proximate cause of the injury to appellant's son, an intelligent boy, 9 years 8 months old, who crossed over the tracks at the street crossing for the express purpose of catching and riding upon a passing freight train.

Elliott, J., dissenting.

(Syllabus by the Court.)

*For the authorities in this series on the question who are licensees, see foot-note appended to Lovett v. Gulf, etc., Ry. Co. (Tex.), 11 R. R. 339, 34 Am. & Eng. R. Cas., N. S., 339; first foot-note appended to Minot v. Boston & M. R. R. (N. H.), 27 R. R. R. 512, 50 Am. & Eng. R. Cas., N. S., 512; first foot-note appended to Louisville & N. R. Co. v. Farris (Ky.), 25 R. R. R. 347, 48 Am. & Eng. R. Cas., N. S., 347; foot-note appended to Railroad Co. v. Village of Roseville (Ohio), 25 R. R. R. 173, 48 Am. & Eng. R. Cas., N. S., 173; Teakle v. San Pedro, etc., R. Co. (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18.

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Appeal from District Court, Hennepin County; John Day Smith, Judge.

Action by Alex Mehalek, father of John Mehalek, against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

H. E. Fryberger, for appellant.

Alfred H. Bright, for respondent.

LEWIS, J. Appellant maintained several railroad tracks at its crossing at Twenty-Fifth Avenue Northeast, Minneapolis, about two blocks from the Schiller public school. The crossing was not furnished with safety gates, and the right of way was not inclosed with a fence; but a flagman was stationed at the crossing for the purpose of warning the public of approaching trains. For many years respondent company had operated a certain freight train, which reached this point every day about the time school was dismissed, 4 o'clock p. m. On May 3, 1907, John Mehalek, in company with another little boy, went from the school to the crossing, passed the flagman, and went over to the other side of the track just before the train arrived. The train consisted of about 35 or 40 freight cars, and according to the boy's testimony, as the last car came along he started to run along beside it, about a foot and a half from it, for the purpose of catching hold of the ladder on the car, when he stumbled and fell forward, striking his left hand against the car, and was whirled around so that his left leg was carried under the wheel and run over below the knee.

Appellant seems to claim negligence on the part of the company on the ground that the flagman was incompetent for the duties which it was necessary for him to perform at that crossing, and that a competent flagman would have been able to prevent the boys from getting on the train. Another suggestion, as legal ground for negligence, is that by not preventing the boys from boarding and riding this train for a number of years the company held out an invitation to them to do so, and therefore owed them the duty of so regulating the speed of the train at its crossing as to lessen the danger of accidents, and that upon the occasion the train was run at an unusually high speed. We find no evidence in the record to found any legal basis for negligence on these grounds. It does not appear that it was the duty of the flagman to follow the boys and see that they did not get on the train, and it is very apparent from the record that it was the practice of all the boys, including appellant's son, to cross over the tracks, get on the opposite side of the flagman, and board the train in such manner as to avoid observation, not only by him, but by the trainmen. There is no evidence in the case tending to show

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that the trainmen held out any inducements to the boys, or ever invited them to get on the train and ride. The mere fact that they were not driven off on every occasion is not sufficient to imply an invitation or license to ride. The trainmen were occupied with their duties, and could not leave their respective places to chase boys, and the train could not be stopped for the purpose of getting rid of them.

There is no evidence that respondent was negligent in maintaining an unblocked frog, or a hole in the roadbed. The track at the crossing was under repair at that time; but, if the then condition of the street had anything to do with the boy's fall, it does not appear that the company was responsible. Where a child of immature years wanders away, and without any particular object in mind, inadvertently goes on a railroad track, it may be that the intervention of a fence or gate would have been sufficient to divert him in some other direction. This is not such a case. According to the undisputed evidence, appellant's son was a nine year old school-boy, of more than ordinary intelligence, lived only a block from the Twenty-Fifth avenue crossing, and his only object in going on the crossing was for the purpose and with the intention of catching on the train and getting a ride. He and other boys had persistently followed this course for three or four years. It is idle to say that he did not know it was dangerous to attempt to ride on the train, or that he did not know it was wrong to do so. Although he testified to that effect, his very conduct in the manner of crossing the tracks and getting on the train indicates that he knew he had no right to do so. The purpose of maintaining gates at such crossing is to give warning of approaching trains, not to bar off persistent trespassers; and this boy had all the warning of the dangers which would have been given by the presence of the gates. The absence of the fence has no bearing on the case, and if the gates had been in place they would only have been lowered at the time of approaching trains, and the boys could easily have passed across before it was necessary to drop the gates, and then waited for the train, or they could easily have dodged the gateman.

We consider the case controlled by *Fezler v. Wilmar & Sioux Falls Ry. Co.*, 85 Minn. 252, 88 N. W. 746, where the facts are very similar. It is distinguished from *Mattes v. G. N. Ry. Co.*, 95 Minn. 386, 104 N. W. 234, Id., 100 Minn. 34, 110 N. W. 98, in the essential feature that in that case the boys were sent out in an open common to herd cattle, and thoughtlessly wandered over the track and took shelter under a standing car, and the younger boy, 6½ years old, was killed. In this case the boy deliberately and persistently approached the train with the fixed purpose of stealing a ride, and he was almost 10 years old. The case differs from *Hayes v. M. C. Ry. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410, in the same particular. There the boy was

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between 8 and 9 years old, and deaf and dumb, and had gone on the tracks under the influence of a childish curiosity to follow a procession.

We agree with the trial court that there is no evidence to indicate that any act of respondent was the proximate cause of the accident, and it is not necessary to consider specially the question of contributory negligence.

Affirmed.

ELLIOTT, J. (dissenting). I am unable to agree with the conclusion reached by the court, and therefore dissent.

BULL v. NEW YORK CITY RY. CO.

(Court of Appeals of New York, June 12, 1908.)

[85 N. E. Rep. 385.]

Carriers—Carriage of Passengers—Refusal to Give Transfer—Penalties—"Aggrieved Party."*—Railroad Law, Laws 1892, p. 1406, c. 676, § 104, provides that a street railroad corporation operating different lines of road under contracts shall carry between any two points on the lines embraced in the contracts any passenger desiring to make one continuous trip between such points for one single fare, and that the corporation shall give to such a passenger paying one single fare a transfer entitling him to a continuous trip, and that for every refusal to comply with the requirements of the section the corporation shall forfeit \$50 to "the aggrieved party." Held, that the section contemplates a person who enters on or continues a trip with the actual desire of getting to some place, and whose controlling purpose is interfered with by an unjust refusal to give him a transfer, and who therefore is defeated of his aim, and does not apply to a person who boarded a car merely to seek information as to the custom of the corporation to issue or not to issue transfers at a certain point over a certain route, which information he desired for use in litigation, and who had no definite purpose of going to any particular place, since he was not prevented by the refusal of a transfer from accomplishing all he had intended, and was therefore not an "aggrieved party."

Same—Fares—Amount of Fare—"Connecting Branch Thereof"—"Main Line of Road and Any Branch or Extension Thereof."—Railroad Law, Laws 1892, p. 1405, c. 676, § 101, provides that no corpora-

*For the authorities in this series on the subject of street railway transfers, see foot-notes appended to *Hornsby v. Georgia Ry., etc., Co. (Ga.)*, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, where all those preceding it are collected; second foot-note appended to *DeBoard v. Camden Interstate Ry. Co. (W. Va.)*, 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84; *Norton v. Consolidated Ry. Co. (Conn.)*, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

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tion constructing and operating a railroad under the provisions of the article shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line, or branch operated by it or under its control, to any other point thereof, or any connecting branch thereof within the limits of any incorporated city, and that not more than one fare shall be charged within the limits of any such city for passage over the main line of road and any branch or extension thereof, etc. Held that the terms "connecting branch thereof" and "main line of road and any branch or extension thereof" contemplate an original or main line which by an off-shoot and tributary line has been extended, the two constituting a single continuous and connected line of road, and not two originally separate lines not constructed with reference to one another, which have become related simply because they have been taken into a general railroad system; and hence, where a street car line did not of itself directly connect with another line upon which a passenger took passage and paid his original fare, but had to be reached by passage over a third line, the latter was not a "connecting branch" of the first line, and he was not entitled to ride on it without payment of additional fare.

Statutes—Construction—Surrounding Conditions—Other Statutes.—

In construing a statute, it is proper to consider conditions existing when it was enacted, and which it may be assumed the Legislature intended to meet, and also other statutes relating to the same subject.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Harcourt Bull against the New York City Railway Company. From an order of the Appellate Division (121 App. Div. 582, 106 N. Y. Supp. 375) reversing a judgment of the Municipal Court of the city of New York for plaintiff and granting a new trial, plaintiff appeals by permission on certified questions. Affirmed, and judgment absolute entered against plaintiff.

This is an appeal, by permission, on certified questions from an order of the Appellate Division, Second Department, entered on or about October 23, 1907, reversing a judgment of the Municipal Court of the city of New York in favor of plaintiff and granting a new trial.

The action was brought to recover a penalty on the theory that defendant had violated both the statute regulating the fare to be charged by a surface street railroad (Railroad Law, Laws 1882, p. 1405, c. 676, § 101) and the statute requiring such road to give transfers (Railroad Laws, § 104). The appellant is an attorney at law, and prior to the date of the alleged violations had very largely been engaged in bringing similar suits against this respondent and other corporations in the city of New York. On this occasion theoretically he set out with his companion, also an attorney, to make a trip from the corner of the Bowery and

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Delancey streets to Fifth street by a course over three different lines of road operated by respondent, and which especially involved the right of a transfer from the so-called Eighth street line to the Avenue C line. He took a car at the starting point first mentioned, and paid the fare of himself and his companion, and obtained transfers to the Eighth street line, but was then informed by the conductor that he would not be given a transfer from the latter line to Avenue C as above stated. Notwithstanding this, he alighted at the corner of Clinton street, and, taking an Eighth street car, again asked for a transfer to Avenue C, which was refused. Again, notwithstanding this, he alighted at the corner of Stanton street and Avenue A, and boarded a car on the Avenue C line, and in substance asserted the right to have had a transfer to that line and therefore to be carried thereon without payment of fare. His assertion having been disregarded, and demand having been made for payment of another fare, he paid the same, and then alighted and returned to his office. As he knew by previous experience at Clinton street, he could have taken a car which would have given him a transfer to the line on Avenue C.

Appellant's purpose in setting out on this trip was that "of simply traveling over the line to see what would be done." He had been bringing suits for penalties for refusals of transfers similar to that here complained of, and he "rode for the purpose of gaining information." He "had no destination whatever on Fifth Street * * *; was traveling over the line to see what information would be given to passengers desiring transfers." The learned Appellate Division, by a divided court, held that under these circumstances he was not such a passenger as was entitled to the benefits of section 104, above referred to, and then certified to us for answer the following questions:

"(1) Is plaintiff entitled to a judgment under the provision of sections 39 and 101 of the railroad law?

"(2) Is plaintiff entitled to a judgment under the provisions of section 104 of the railroad law?

Harcourt Bull, pro se.

James L. Quackenbush, for respondent.

HISCOCK, J. (after stating the facts as above). We shall answer the questions above certified to us in the inverse order of their statement.

The respondent was operating the lines of road on which appellant sought to ride, and many other lines under leases and contracts authorized by statutory provisions now incorporated in Railroad Law, Laws 1892, p. 1382, c. 676, and therefore the following provisions of section 104 of said statute were applicable: "Every such corporation * * * shall * * * carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one con-

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tinuous trip between such points for one single fare. * * * Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit fifty dollars to the aggrieved party." In the cases of *Myers v. Brooklyn Heights R. R. Co.*, 10 App. Div. 335, 41 N. E. 798, and *Nicholson v. N. Y. City Railway Co.*, 118 App. Div. 858, 103 N. Y. Supp. 695, decided, respectively, by the Second and First Appellate Divisions, it was held in effect that a person traveling over a street railroad simply for the purpose of being denied a transfer in order that he might bring a suit for a penalty under the statute quoted does not come within the protection and benefits thereof, and cannot recover such penalty.

We agree with the results reached in those cases, and, reinforced as they are by what was written in the cases of *Southern Pacific Co. v. Robinson*, 132 Cal. 408, 64 Pac. 572, 12 L. R. A. (N. S.) 497, and *Jolley v. Chicago, Mil. & St. Paul Co.*, 119 Iowa, 491, 93 N. W. 555, we might very well content ourselves with basing the affirmance of the judgment now appealed from upon the authority of those cases so far as this question is concerned, were it not for the fact that the appellant claims that his case may and should be distinguished from those of *Myers* and *Nicholson*. The tangible and practical result of the refusal to appellant of the transfer complained of seems to be as in those former cases a suit for a penalty. But he doubtless is entitled to have his purposes and mental operations on the occasion in question measured by the evidence by which he has chosen to define them. According to this, he desired to ride over certain lines of respondent's road for the purpose of ascertaining whether at a given point a transfer would be issued to him enabling him to ride over a certain route in the direction of the point which he had proposed to himself as the termination of his journey, and this information he was seeking in order that, as attorney, he might conduct various suits for penalties for refusals to issue transfers at the point he was investigating. It is at once apparent that the margin between this case and the former ones cited is at best very narrow. There the plaintiff had ridden for the purpose of laying the foundation for a suit to be commenced in his behalf for the penalty. In this case the appellant has ridden for the purpose of acquiring information as attorney, and which was to be utilized for the benefit of suits already commenced in behalf of his clients for penalties. If we

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assume, however, that there is a narrow margin, the question is whether it is sufficient to place this case within the provisions and benefits of the statute when the other ones lay outside thereof. The statute which we quoted was passed for the benefit of a "passenger desiring to make one continuous trip between certain points for one single fare, and it requires that the corporation shall "give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point," etc. It was passed "to the end that the public convenience may be promoted by the operation of the railroads * * * substantially as a single railroad with a single rate of fare," and it gives a right of action to one who has been "aggrieved."

Whether we contemplate this statute from the standpoint of a passenger as a remedial one or from the standpoint of the railroad as one for penalties, a reasonable construction of it seems to make some things manifest. It was passed in the interest of the public convenience, which we suppose to mean in the interest of the general traveling public. It was passed in the interest of a passenger "desiring to make a continuous trip" between certain points, and we believe that this means a person who enters on or continues a trip with the real and actual desire of getting to some place and whose controlling purpose is interfered with or defeated if the railroad company unjustly refuses to give him a transfer which would enable him to reach the point for which he has set out and who, therefore, by such refusal is disappointed and defeated of his aim and an "aggrieved party." We do not believe that the appellant comes within the contemplation of the statutory purposes thus outlined. His controlling thought and aim when he started out was to acquire information in regard to the custom of respondent to issue or not issue transfers at a certain point over a certain route, and which information he desired for use in litigation. If he fixed in his mind a definite point of destination, it was simply because he conceived it might be necessary for him to travel to that point in order to acquire the information. As a matter of fact, he acquired the information which he desired at every separate stage of his journey from beginning to end, and he as well might have stopped at the end of the first stage as to have continued to the last one, except that he apparently desired to accumulate evidence as well as information, and also to lay the foundation for a claim for illegal conduct against the respondent on the second theory involved in this case. As soon as he had completed this purpose, he alighted from the car and returned to his office. By the failure to issue the transfer he was not defeated in any purpose which led him to take the respondent's cars for he had accomplished all that he had desired or intended to. He was not aggrieved because the respondent by a refusal to issue the transfer had prevented him from consummating some plan which it was bound to assist him in consummating by issuing the transfer.

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It is, however, urged by the appellant, and was written in the dissenting opinion below, that we ought not to construe the statute before us as we have done because this court in the case of *Fisher v. N. Y. C. & H. R. R. R. Co.*, 46 N. Y. 644, has decided that which forbids such construction. We do not regard such decision as so holding. In that case, as is well known, the court had before it for consideration chapter 185, p. 432, Laws 1857, providing "any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same," and it was held by a bare majority of the court that a recovery could be had by a party who rode and paid the excessive fare simply for the purpose of obtaining the penalty, the court saying: "The forfeiture is imposed upon the company for its act, and this entirely irrespective of the object or motive of the passenger in traveling." We accept this decision and the reasoning which led to it. The penalty or "forfeiture" as it was called was regarded as a punishment inflicted on the railroad for its wrongful act and any "party" was made a proper agent for inflicting the punishment. As we have already indicated, we do not regard the language used in the statute now before us in meaning, purpose, or effect as at all similar to or the equivalent of the language which was used in the statute of 1857, and thus interpreted. It is stated, in substance, in the dissenting opinion below, that no distinction is to be drawn between the two statutes narrowing the right to sue under the later one simply because the earlier one in conferring a right of action uses the word "party" while the other one employs the word "passenger," that the "party" authorized by the earlier statute to bring an action would necessarily be a "passenger" and that, therefore, such word "passenger" employed in the later statute is not any more restrictive or limited in its meaning than the word "party." Neither statute is well construed by reference to a single word. We may concede that the "party" mentioned in the statute involved in the *Fisher Case* was in a certain sense a passenger, but, as we have pointed out, section 104 requires that the successful plaintiff shall be more than a passenger simply in the sense of paying a fare and traveling over a railroad. If we have read the language aright, it contemplates and requires a passenger or traveler of a certain character, one who actually desires to reach some point of destination for a purpose only accomplished by reaching that point, or who desires to be carried for some recognized purpose even though nothing more than recreation, and whose desire is defeated rather than consummated by the refusal to give him the necessary transfer. Neither do we agree, as stated in the dissenting opinion below, that "in the present case 'the forfeiture is imposed upon the company for its

act, of refusing a transfer, and charging another fare, and this entirely irrespective of the object or motive of the passenger in traveling.' ” In the Fisher Case, as we have pointed out, it was stated that “the forfeiture is imposed upon the company for its act and it is entirely irrespective of the object or motive of the passenger in traveling.” Under the present statute, whatever may be said of the intent to punish the corporation, that punishment can only be inflicted at the instance of a passenger who has been “aggrieved” through being prevented from accomplishing that which the statute attempted to make secure.

We pass to the consideration of the other question submitted to us, whether appellant is entitled to a judgment under the provisions of sections 39 and 101 of the railroad law. Section 101, so far as it is material, provides as follows: “No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city.

* * * Not more than one fare shall be charged within the limits of any such city * * * for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article.” This section by its own terms provides no penalty for violation thereof, and for the right to recover a penalty resort must be had to the provisions of section 39. We shall assume for the purposes of this case, without deciding it, that section 39 does apply to and supplement section 101. The line on Avenue C, on which appellant claimed the right to ride without payment of additional fare, does not directly and of itself connect with the line in Delancey street on which he first took passage and paid his original fare, but one must reach the former line from the latter one by passage over a third line. It also sufficiently appears that these lines originally were owned or controlled respectively by different companies and were independent of and distinct from one another, and finally, under various leases and contracts, were assembled with very many other lines into a general railroad system controlled and operated by the respondent which was originally incorporated and organized for the purpose of operating an entirely distinct and insignificant line of road. We shall assume, without discussion, that under the provisions of the statute quoted appellant would have been entitled to ride for a single fare over the entire length of any one of the three lines. That, however, does not meet his needs in this litigation. He is compelled to claim and ask us to hold that the Delancey street

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line and the Avenue C line were respectively a road owned, operated, or controlled by the respondent and a "connecting branch thereof," or a "main line of road and a (any) branch or extension thereof." That is, the narrow question is whether the Avenue C line can be regarded as a connecting branch or extension of the Delancey street line or vice versa. We do not think it can be. We agree with the learned counsel for the appellant that his right to recover in this litigation is not to be decided by the sole fact that he did or did not attempt to take his ride in a single car, and whatever was said or intimated in *O'Connor v. Brooklyn Heights Railroad Co.*, 123 App. Div. 784, 108 N. Y. Supp. 471, appearing to limit on that ground the right of the litigant to recover, is, we think, too narrow. But it does seem to us that it would be extravagant and unreasonable to hold that two lines of road mentioned, originally constructed and owned by separate companies and operating different lines of cars and brought into physical relation on the route selected by appellant only by means of a third intervening line of road, constituted a road and "connecting branch thereof" or "main line of road and any branch or extension thereof." These terms suggest an original or main line which by an off-shoot and secondary and tributary line has been extended or continued, the two constituting a single continuous and connected line of road. They do not naturally suggest two originally distinct and separate lines of road not constructed with reference to one another or coming into connection with each other, and which have become related to each other simply because they have been taken into a general railroad system. A practical test of appellant's theory would be presented by the question whether the road which he took on Delaney street and another road in the extreme upper part of New York, originally entirely distinct in construction and operation and separated by many miles, could be regarded as road and connecting branch simply because at some time by separate leases they were incorporated into a single system, and one could be reached from the other by traveling over many different intervening lines. The construction which we adopt as in accordance with what we regard as the ordinary meaning of terms is, we think, fortified by section 90 of the railroad law, which deals with and gives a pretty definite idea of what the Legislature intended when it spoke of roads and branches and extensions thereof.

Our construction of this statute adverse to the appellant's contention is, we think, also supported and sanctioned by another consideration of much importance. In construing a statute, we have a right to consider conditions existing when it was adopted, and which it must be assumed the Legislature intended to meet, and also other statutes relating to the same subject. Section 101

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is, in effect, a re-enactment of statutory provisions originally found in section 13, c. 252, p. 314, Laws 1884. Under the provisions of that act surface street railroad companies enjoyed what, in practical effect, was only a limited right to make contracts to run upon and use the railroad tracks of one another, and it is doubtful whether any right would have existed enabling the Delancey street and Avenue C lines to make a contract or lease one with another because parallel lines. We think it cannot be claimed that the Legislature then could have contemplated the existence of any such extensive and complicated street surface railroad system as was afterwards created in the city of New York, or that it then intended to deal in the matter of fares with all of the constituent lines incorporated into such a system, but that it had in mind, as the statute expressed, the ordinary case of a road and direct and actually connecting branches and extensions. Subsequently chapter 305, p. 525, Laws 1885, was passed, which, in effect, re-enacted some of the provisions of earlier statutes and added others, and which expressly secured to different surface railroad companies the right to make leases and contracts of and with one another, and under which provisions, continued and amended from time to time, it became possible and practical to gather together an extensive system of former independent railroad lines like that now operated by the defendant. When this condition presented itself, the Legislature recognized the necessity for broader safeguards securing to the traveling public the right of travel over various lines in a single system for a single fare, and therefore, by the same statute last referred to, adopted provisions requiring the company operating the different roads, for a single fare, to give a transfer entitling the person receiving it to a continuous trip over the different roads gathered together under a contract and lease as therein provided, and which provisions have now been carried into section 104.

The question at once arises, and we think cannot be satisfactorily answered in accordance with appellant's theory: What was the object in adopting these provisions of 1885, requiring transfers over different roads of a system, if the prior provisions of 1884, providing for a single fare over a road and its extension or connecting branch, already covered roads which did not actually connect, but were parts of a general system? We do not think that any of the cases especially relied on by the appellant to sustain a conclusion different from that reached by us fairly do so. *Muckle v. Rochester Railway Co.*, 79 Hun. 32, 29 N. Y. Supp. 732, was an action of assault for unlawfully ejecting the plaintiff from one of defendant's cars, and all of the questions therein arose in connection with a transfer which the defendant had issued. The court did say: "The payment by the plaintiff of a single fare of five cents entitled him to one continuous passage from any one to any other point of the railroad operated by

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the defendant. Laws 1890, p. 1113, c. 565, § 101." We are not able to determine just what this statement under any circumstances might mean as applied to the railroad operated by the defendant, but the question of the right of the plaintiff to ride for a single fare where he was going does not appear to have been at all disputed or considered. The defendant assumed this and based its defense entirely on other considerations. In the case of *Senior v. N. Y. City Railway Company*, 111 App. Div. 39, 97 N. Y. Supp. 645, subsequently affirmed by this court (187 N. Y. 559), the controversy and discussion proceeded on quite different lines from those involved here. In *Baron v. N. Y. City Railway Co.*, 120 App. Div. 134, 105 N. Y. Supp. 258, no three of the learned judges, as we read the different opinions, united in passing upon the question here involved in the manner desired by the appellant. The actual question involved in that case grew out of facts quite different from those presented here.

In conclusion, we think that each of the questions certified to us should be answered in the negative, and that the order appealed from should be affirmed and judgment absolute entered against the appellant, on his stipulation, with costs in all courts.

GRAY, VANN, WERNER, and CHASE, JJ., concur. CULLEN, C. J., and HAIGHT, J., not sitting.

Ordered accordingly.

JAMES v. AMERICAN EXPRESS CO.

(Court of Errors and Appeals of New Jersey, June 15, 1908.)

[70 Atl. Rep. 131.]

Carriers—Express Company—Delay in Delivery—Evidence.*—In an action against an express company for delay in the delivery of plaintiff's trunk, containing articles which he intended to use at a summer resort, evidence that the hotel to which the trunk was to be delivered and where plaintiff was to stop was a high-priced hotel, patronized by people of wealth and prominence in the business and social world, that many social functions and entertainments were conducted there for the benefit of the guests, and that there were tennis courts and golf links for the use of guests, which plaintiff desired to use, had used on former occasions, and which he did use after receiving the apparel contained in the trunk, was admissible, as bearing on plaintiff's damage.

*For the authorities in this series on the subject of the measure and elements of damages for delay in transporting or delivering freight, see foot-note appended to *Southern Ry. Co. v. Coleman* (Ala.), 27 R. R. R. 153, 50 Am. & Eng. R. Cas., N. S., 153, where all those preceding it are collected.

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Error to Supreme Court.

Action by Peter H. James against the American Express Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Riker & Riker, for plaintiff in error.

F. W. Hastings, for defendant in error.

PER CURIAM. This case came before the Supreme Court upon an appeal from a judgment of the Second district court of Jersey City. The Supreme Court affirmed the judgment upon the grounds stated in the following memorandum:

"Per Curiam. The only legal question presented by the state of the case is whether it was error in the trial court to permit the plaintiff to testify that the hotel at Babayan was a high-priced hotel, patronized by people of wealth and prominence in the business and social world, and that many social functions and entertainments were conducted at the hotel for the benefit of the guests, and that there were also tennis courts and golf links for the use of the guests, which he had desired to use and had used on former occasions, and which he did use after he received the two suits from Jersey City. We think that there was no error in permitting this testimony. The judgment rests upon the negligence of the defendant in failing to deliver to the plaintiff at the hotel in question a trunk containing the articles which he had intended to use at that place of resort. The testimony in question tended to throw light upon the nature and to some extent the degree of deprivation suffered by the plaintiff, owing to the defendant's negligence. It was relevant to the issue, and hence its admission not illegal. The judgment of the Second district court of Jersey City is affirmed."

We concur in theses views, and the judgment under review should therefore be affirmed, with costs.

CONHEIM *v.* CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Minnesota, May 22, 1908.)

[116 N. W. Rep. 581.]

Carriers—Baggage of Passengers.—When a trunk is delivered to the baggageman at a railway station in proper season, the passenger has the right to require that it shall be carried on the same train which he takes.

Same—Baggage—Failure to Deliver.*—The proper measure of damages for the failure of a railway company to deliver a traveling man's trunk containing samples is the value of the use of the property during the delay, including such incidental expenses and damages as were in the contemplation of the parties when the contract for carriage was entered into.

Same—Damages.—The evidence in this case was too indefinite and speculative to form a basis for estimating the amount of the damages.

(Syllabus by the Court.)

Appeal from Municipal Court of St. Paul; Hugo O. Hanft, Judge.

Action by Leo Conheim against the Chicago Great Western Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

A. G. Briggs and *Edward A. Knapp*, for appellant.

Markham & Calmenson, for respondent.

ELLIOTT, J. The respondent, Conheim, a traveling salesman for a house dealing in men's wearing apparel, desiring to go from St. Paul to Rochester, Minn., purchased a ticket and checked his trunk containing samples necessary for use in his business. This trunk, of the kind and style usually carried by traveling salesmen, was delivered to the appellant's baggageman at the Union Station in St. Paul at 4:30 p. m. of December 6, 1906. Conheim was known to the baggageman, who had seen his samples and knew that he was a traveling man. When the trunk was checked, Conheim told the baggageman that it must be sent forward to Rochester, Minn., on the Chicago Great Western train which was to leave the station at 5:30 p. m. of that day. There was no other conversation between the parties. Conheim went to Rochester on that train, and did not learn until the next morning that the trunk had not accompanied him. It finally reached Rochester at 1:30 p. m. of that day, and in an action for damages Conheim claimed that, through the negligence of the railway company in failing to forward this trunk as directed, he

*See foot-note appended to preceding case.

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lost one day's time, to his damage in the sum of \$50. The trial court awarded him \$17.50, and this appeal was taken from an order denying defendant's motion for a new trial.

Under the rule announced in *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052, and *McKibbin v. Wisconsin Central Ry. Co.*, 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. Rep. 689, the plaintiff established a cause of action for nominal damages, at least, against the railway company; but we regret to say that it is necessary to reverse the order because of the application of an erroneous rule for determining the damages and the indefinite and unsatisfactory nature of the evidence offered to prove damages. When the agent of a railway company knows the nature of the trunks and the character of the business of a traveling salesman, and is aware of the fact that the passenger cannot transact his business without using the contents of the trunk, and that it is necessary that the trunk shall accompany him, and nevertheless neglects to forward the trunk as directed, whereby the passenger is delayed in his business, the carrier is liable for the damages naturally resulting therefrom. Under such circumstances the passenger is entitled to have a trunk, which he delivers to the baggageman at the station in proper season, go forward on the same train which he takes. This action was brought on the theory that the plaintiff was entitled to recover the value of the time lost by him through the delay in forwarding his trunk according to directions. Assuming that the trunk was delivered to the station baggageman, and directions given, within a reasonable time before the departure of the train, the company was negligent, and plaintiff was entitled to recover the damages which he was able to prove resulted from such negligence. The action was brought on the theory that he could recover for the value of the time lost; but the respondent now practically concedes that the proper measure of damages in such a case is the value of the use of the property during the time of delay of delivery, including such incidental expenses and damages as were in the contemplation of the parties at the time the contract was entered into. *Southern Ry. Co. v. Coleman* (Ala.) 44 So. 837; *Texas, etc., Ry. Co. v. Douglass* (Tex. Civ. App.) 30 S. W. 487; *Railway Co. v. Russell* (Tex. Civ. App.) 97 S. W. 1090; *Elliott on Railroads* (2d Ed.) § 1662a; *Moore on Carriers*, p. 730.

It was not pleaded, and there was no evidence to show, that the defendant's baggageman was notified that any special reason existed for expediting the delivery of this trunk. In a case very like this (*Katz v. Cleveland, etc., Ry. Co.*, 46 Misc. Rep. 259, 91 N. Y. Supp. 720) the court said: "The reason given by plaintiff's principal witness why unusual damages resulted from the delay was that he needed the samples in order to fulfill engage-

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ments already made with prospective customers, and that he could not sell goods in the absence of samples. He did not, however, give defendant any notice of these special circumstances. All he did was to notify defendant's baggageman that he had a large sample trunk that he wished checked. This certainly is not calculated to convey the intelligence that any special reason existed for expediting the trunk which would not apply to any trunk. Under the evidence as it stood, the plaintiff should have been nonsuited." If Conheim had been able to prove that the baggageman was notified of the special reasons why it was important that this trunk should go with him on the next train, he might have recovered what he lost by not having the use of the samples. He spent the morning, after he learned that his trunk had not arrived, in calling on his customers in Rochester. In the afternoon, after the trunk had arrived, he showed them his samples, and it is not claimed that he lost any sales in Rochester. He does claim that if the trunk had been in Rochester in the forenoon, when he called for it, he could have finished his work and left there about 3 o'clock in the afternoon, and gone to Owatonna, where he intended to call upon other customers, and that because of the delay in Rochester he did not stop at Owatonna, but went on to Austin. He says that the loss for which he claims damage was "the subsequent loss of time from not having the samples at Rochester on that particular day." It does not appear that he had any regular customers at Owatonna, or that there was any reasonable probability that he would make any sales there. It was all left to conjecture.

The estimate of the value of his time was also very indefinite. He "figured that his time ran from \$25 to \$50 a day on the average," and sometimes more. He "estimated that his time ran not less than \$25 a day, and from that up, while he was on the road." He testified that the only loss he sustained was by reason of the loss of the commissions he might have made; but it appeared that, while he was working on a commission basis, the firm paid him a stipulated sum every month, regardless of his earnings—that is, he received a fixed amount each month to cover his living expenses. It does not appear what this amount was, although it is conceded that it was paid for the day which he claims to have lost. Upon this state of the evidence it is impossible to estimate with any reasonable degree of accuracy what the value of the use of the property would have been during the time its delivery was withheld.

The order is therefore reversed, and a new trial granted.

LOUISVILLE & N. R. Co. *v.* CHURCH.

(Supreme Court of Alabama, April 16, 1908.)

[46 So. Rep. 457.]

Negligence—Pleading—Sufficiency.—Where the gravamen of an action is the alleged nonfeasance or misfeasance of another, a complaint which avers the facts out of which the duty to act springs and that defendant negligently failed to perform such duty is as a general rule, sufficient, and it is not necessary to specify the particular acts of diligence which defendant should have employed in the performance of such duty.

Carriers—Injuries to Passengers—Actions—Complaint.—A complaint in an action for injuries to a passenger, which alleges that while plaintiff was a passenger, and was being carried by defendant as such on a train, her hand was caught in the car on the train between a table on the train and the wall of the car, and was injured, and that the injuries were occasioned as a proximate consequence of the negligence of defendant in and about carrying plaintiff as a passenger, sufficiently sets out, as against a demurrer, the negligence of defendant.

Same—Liability of Carrier—Injury in Sleeping Car.*—A railway company cannot escape liability for injuries inflicted on a passenger on the ground that they were sustained in a sleeping car, owned by another company and which furnished its own agents, notwithstanding the passenger paid an additional fare to the sleeping car company for the privilege of riding in one of its cars, where it appears that the sleeping car was a part of the company's train.

Same—Negligence of Porter of Sleeping Car.*—A passenger, having a ticket for transportation and a Pullman car ticket, was injured

*For the authorities in this series on the subject of the liability of railroad companies for injuries to passengers from the negligence or fault of sleeping car companies or that of their employees, see note 3 R. R. R. 163, 26 Am. & Eng. R. Cas., N. S., 163 (duty to furnish safe and suitable cars, etc.); Nashville, etc., R. Co. *v.* Lillie (Tenn.), 10 R. R. R. 590, 33 Am. & Eng. R. Cas., N. S., 590 (railroad insures hand baggage placed by passenger under berth in sleeping car); St. Louis, etc., Ry. Co. *v.* Hatch (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782 (assault on passenger); extensive note, 2 Am. & Eng. R. Cas., N. S., xiii, et seq. (loss of or injury to baggage); foot-note appended to Airey *v.* Pullman Palace Car Co. (La.), 11 Am. & Eng. R. Cas., N. S., 836 (liability of railroad for negligence of sleeping car employees); Pullman Palace Car Co. *v.* Lawrence (Miss.), 8 Am. & Eng. R. Cas., N. S., 59 (assault by sleeping car porter on passenger); note appended to Louisville & N. R. Co. *v.* Ray (Tenn.), 11 Am. & Eng. R. Cas., N. S., 174 (sleeping car employees as railroad employees); Newcomb *v.* New York Cent. & H. R. R. (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10 (sleeping car porter was an employee so as to charge railroad company with his negligence in directing passengers to jump from wrong train while it was in motion).

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while in a Pullman car by a table handled by a porter of the car falling on her hand. Held, that the railroad company was liable for any neglect of duty by the porter causing the injuries.

Same—Presumption.—The law will presume that a porter, employed and assigned by the Pullman Company to control the interior of a sleeping car, in which a passenger was riding, exercised such control with the assent of the railroad company.

Same—Instructions.—Where, in an action for injuries to a passenger while in a Pullman car, caused by the negligence of a porter of the car, there was nothing to show that the porter was not the servant of the railroad company, and he might have been the servant of the railroad company, or employed and controlled jointly by it and the Pullman Company, the refusal to charge that the jury could not find that the railroad company's agents were guilty of any negligence proximately causing the injuries was proper.

Same—Misleading Instructions.—In an action for injuries to a passenger, caused by a table handled by a porter of a Pullman car falling on her hand, a charge that if the jury believed that the table fell because of an unforeseen accident, and one that could not have been anticipated by reasonable care and foresight on the part of the railroad company or the Pullman Company, the jury must find for the railroad company, was misleading, as leading the jury to believe that they could not find for plaintiff unless the accident was foreseen or anticipated by the railroad company or the Pullman Company, regardless of the acts or omissions of their servants.

Same—Instructions—Degree of Care Required.—In an action for injuries to a passenger while in a Pullman car, caused by a table handled by a porter falling on her hand, a charge that the railroad company owed to its passengers the duty to exercise the highest degree of care, skill, and diligence known to skillful and diligent persons in like business was not erroneous.

New Trial—Grounds—Newly Discovered Evidence—Diligence.—In an action for injuries to a passenger it appeared that plaintiff, in answer to interrogatories propounded to her long before the trial, gave the name of a physician who had treated her. On the trial plaintiff testified and showed that such physician had treated her. Defendant could have located the physician before the trial. It did not request the court to delay the trial for such a reasonable time as would have enabled it to procure the physician as a witness, who resided in the state. Held, that the court did not err in denying a motion for a new trial on the ground of newly discovered evidence, consisting of the testimony of the physician.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Ann D. Church against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

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Count 1 of the complaint is as follows: "Plaintiff claims of defendant \$1,999, for that theretofore, to wit, on the 21st day of February, defendant was a common carrier of passengers by means of a train on a railroad, that on said day, while plaintiff was defendant's passenger and being carried by defendant as such upon said train, and while said train was at a point on said railway in or near Mobile, Ala., plaintiff's hand was caught in the car on said train between a table or other hard article on said train and the wall or partition of said car, and as a proximate consequence thereof plaintiff's hand was bruised, mashed, and otherwise injured, the nerves and blood vessels thereof were lacerated, bruised, and injured, and said hand was caused to swell very much, and that the bones thereof were broken, etc., and plaintiff was rendered permanently less able to work and earn money, and was put to great trouble, inconvenience, etc., and expense for medicine, medical attention, etc., in and about her efforts to heal and cure her said wounds and injuries; and plaintiff alleges that her hand was caught as aforesaid, and she suffered said injuries and damages, by reason and as a proximate consequence of the negligence of defendant in or about carrying plaintiff as its passenger as aforesaid." The demurrer was that the complaint does not sufficiently set out in what the negligence of the defendant consisted. The evidence tended to show that plaintiff was a passenger, with ticket for transportation and also a Pullman ticket, and that her injuries were received in a Pullman car, by a table which was being handled by a porter of the car falling upon her hand and pinning it to the wall.

The assignments of error numbered in the opinion are as follows: "(2) The court erred in refusing the first charge requested by the appellant, which charge is as follows: 'The defendant, the Louisville & Nashville Railroad Company, is not responsible in this action for the negligent act of the Pullman Company's porter, if the jury believe from the evidence that the Pullman Company's porter was negligent.'" Assignment of error 3 is the failure to give the following charge: "If the jury believe from the evidence that plaintiff was a passenger on the Pullman Company's car at the time of her injury, then the jury must find for the defendant, the Louisville & Nashville Railroad Company." (8) Refusal to give the general affirmative charge. (9) Refusal to give the following charge: "If the jury believe the evidence they must find for the defendant, the Louisville & Nashville Railroad Company, unless they believe from the evidence that plaintiff's injuries were caused by the negligence of defendant, the Louisville & Nashville Railroad Company in causing its train to lurch or jar." (10) Refusal to give the following charge: "If the jury believe from the evidence that the injuries to plaintiff's hand were caused by the negligence of the

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Pullman's porter, without any negligence on the part of defendant or its servants, except that of the porter of the Pullman Company, the jury must find for the defendant." (11) The refusal to give the following charge: "If the jury believe from the evidence that the sole proximate cause of plaintiff's injuries was the negligence of an employee of the Pullman Company, the jury must find for defendant." (12) The following portion of the oral charge of the court: "For the acts of the porter of the Pullman car, operated by the railroad company as part of its train and upon its track, the railroad company is responsible as for the acts of the servants of the railroad company."

The following charges were also refused to the defendant: "(4) The jury are not authorized to find on the evidence that defendant the Louisville & Nashville Railroad Company's agents or servants were guilty of any negligence which was the proximate cause of plaintiff's injuries. (5) The jury are not authorized to find from the evidence that defendant the Louisville & Nashville Railroad Company is responsible for the injury to plaintiff, unless the jury also believe from the evidence that the employee of the Pullman Company was guilty of negligence which proximately caused plaintiff's injury. (6) If the jury believe from the evidence that the table fell because of an unforeseen accident, and one that could not have been anticipated by reasonable care and foresight on the part of defendant or the Pullman Company, the jury must find for defendant."

Charge 6, given at the request of plaintiff, is as follows: "The railroad company owed to its passengers the duty to exercise the highest degree of care, skill, and diligence known to very careful, skillful, and diligent persons in like business."

Tillman, Grubb, Bradley & Morrow, for appellant.

Bowman, Harsh & Beddow, for appellee.

ANDERSON, J. "When the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint aver the facts out of which the duty to act springs and the defendant negligently failed to do and perform. It is not necessary to define the quo modo, or to specify the particular acts of diligence he should have employed in the performance of such duty." *Southern R. R. v. Burgess*, 143 Ala. 367, 42 South. 36, and cases there cited. The complaint, in the case at bar, was not subject to the demurrer interposed and which was properly overruled by the trial court.

A railroad company cannot escape liability for injuries inflicted upon a passenger upon the ground that they were sustained in a sleeping car owned by another company and which furnished its own agents and servants, notwithstanding the passenger paid an additional fare to the sleeping car company for the privilege of

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riding in one of its cars, when it appears that said sleeping car was a part of the railroad company's train. The railroad company undertook to safely transport the plaintiff, and it was its duty to furnish safe cars and polite attention and careful servants, and it was liable for any neglect of duty whereby the plaintiff was injured, whether in a car owned and controlled by the sleeping car company or not. *Penn. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Railroad v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Kinsley v. Lake Shore R. R.*, 125 Mass. 54, 28 Am. Rep. 200; *Pullman Co. v. Norton* (Tex. Civ. App.) 91 S. W. 841. This last case was by the Texas Court of Civil Appeals, wherein a writ of error was denied by the Supreme Court. The court held that under a contract between the railroad company and the sleeping car company, and as between said parties, the sleeping car company was liable for injuries sustained by the plaintiff when passing from one sleeper to another, but also held that as to the plaintiff's right both companies were answerable. There is no merit in assignments of error 2, 3, 8, 9, 10, 11, and 12.

Charges 4 and 5, requested by the defendant, were properly refused. If not otherwise bad, they ignore or pretermitt all evidence or inferences that the porter was the servant of the railroad company. The law will presume that the porter, if employed and assigned by the Pullman Company to the control of the interior of the sleeping car in which the plaintiff was riding when injured, exercised such control with the assent of the railroad company. Moreover, there is nothing in the record to show that the porter was not the servant of the railroad. He was a porter on the Pullman, it is true; but he may have been the servant of the railroad, or employed and controlled jointly by both companies.

Charge 6, requested by the defendant, was properly refused. If not otherwise bad, it was calculated to mislead the jury to believe that they could not find for the plaintiff unless the accident was foreseen or anticipated by the defendant or the Pullman Company—that there must have been corporate negligence, regardless of the acts or omissions of the servants.

The trial court did not err in giving charge 6, requested by the plaintiff, and did not, therefore, err in refusing a new trial for the giving of same. *Southern R. R. v. Burgess*, 143 Ala. 368, 42 South. 35.

We are not disposed to put the trial court in error for refusing the new trial. The jury evidently believed the plaintiff's evidence, which was corroborated as to the extent of her injury, and inspected her hand, which was exhibited to them, and the damage was not excessive, if the injuries were as serious as the plaintiff's evidence tended to show. Nor was proper diligence shown by the defendant to get the testimony of Dr. Worcester, who

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resided in Birmingham. The affidavit of counsel shows that plaintiff, in answer to interrogatories propounded to her long before the trial, gave the name of this identical witness as one of the physicians who treated her. If she did not state that he lived in Birmingham, it was doubtless due to the fact that she was not asked. At any rate, the defendant was informed that such a man treated her, and could have located him before the trial. But, conceding that defendant knew nothing of this witness until plaintiff testified in the case, the court would have doubtless delayed the trial, upon request of the defendant, such a reasonable time as would have enabled the procurement of the witness. In the absence of such a request and refusal, the defendant is in no position to put the trial court in error for refusing its motion because of newly discovered evidence.

The judgment of the city court is affirmed.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

CALHOUN v. PULLMAN CO.

(Circuit Court of Appeals, Sixth Circuit, February 15, 1908.)

[159 Fed. Rep. 387.]

Pleading—Demurrer—Admission of Facts.—A demurrer to a petition admits all the facts well pleaded.

Carriers—Carriage of Passengers—Sleeping Cars.*—All the duties to a passenger incident to a carrier's contract of transportation continue to rest on the railroad company, notwithstanding the passenger, by virtue of another contract with the sleeping car company, is entitled to special accommodations in the sleeping car; the sleeping car company having no control over the contract for transportations, and not being responsible for the manner in which it is performed.

Same—Acts of Agent—Scope of Authority.—Where a passenger's railroad ticket reading from New York to Washington, and thence to Chattanooga, provided that the ticket should be countersigned at New York, the passenger was bound to know that a sleeping car company could not guarantee the manner in which the railroad company should perform its contract, and that the sleeping car company's agent had no authority to agree that the passenger's ticket would be acceptable for transportation to Washington without being countersigned in New York, and might be countersigned in Washington.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This cause was disposed of in the court below upon a demurrer

*See preceding case, and foot-note.

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to the plaintiff's petition. The demurrer was sustained, and the judgment was for the defendant. The opinion of the court by Judge McCall is reported in (C. C.) 149 Fed. 546. The action was for a breach of contract for the use of a sleeping berth in one of the cars of the defendant from Providence, R. I., to Washington, D. C., and an alleged supplementary agreement that he could have a certain railroad ticket, which he had for transportation from New York to Washington, countersigned in Washington, whereas the railroad company required it to be countersigned in New York, in consequence of which he was refused further transportation by the railroad company at Trenton, N. J., and obliged to return to New York.

The petition alleged: "That on the 1st day of September last the plaintiff was the holder of a ticket which entitled him to be carried over the Pennsylvania R. R. from New York City to Washington City, and thence over connecting lines to Chattanooga, Tenn., which said ticket he exhibited to the agent of the defendant in Providence, R. I., who informed him that by purchasing a local ticket from Providence to Jersey City he could sell him and furnish him a lower berth in the Pullman car from Providence to Washington, where he could get the railroad authorities to fix his railroad ticket so that he could go forward on his journey, returning to Chattanooga. The aforesaid agent of the defendant examined the aforesaid railroad ticket, and informed him that it was not necessary for him to go to New York for the purpose of having his ticket countersigned. That he could have that done in Washington, and thereupon, and upon the assurance given by the agent of the defendant, the plaintiff purchased a local ticket which entitled him to enter upon the train of the connecting railroad company, and to enter a sleeping car thereto attached and to be transported therein over the lines of that carrier to Jersey City and over the lines of the Pennsylvania R. R. from Jersey City to Washington, and having the assurance as aforesaid, that with the aforesaid railroad ticket and the sleeping car ticket, and upon the undertaking of the defendant, for the compensation it received for the said sleeping car berth, to furnish the plaintiff the accommodations of the sleeping car from Providence, R. I., to Washington City, and upon the assurance made to him by the agent of the aforesaid defendant, and the warranty that, upon his aforesaid railroad tickets and the sleeping car ticket, he would have and enjoy the right to occupy the berth he purchased from Providence, R. I., to Washington City, he entered into the aforesaid contract with the defendant company, became a passenger upon the car, occupied the berth assigned to him, and was carried without molestation until the train reached Trenton, N. J., when he was awakened by the porter of the sleeping car and informed that the train conductor desired to see him.

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That the train conductor informed him that, notwithstanding the representation and warranty made to him by the agent of the defendant company, he would not be carried as a passenger, because his ticket had not been countersigned at New York, and that, unless he paid him the local fare, he would be ejected from the car. That the plaintiff thereupon paid to the conductor the local fare to Philadelphia, it being the nearest station at which the train stopped, and then, notwithstanding the assurance and warranty so made by the defendant company as aforesaid, he was ejected by the conductor from the said car, and suffered the humiliation of a public ejection, was necessitated to go back to New York to have his ticket countersigned, was delayed upon his trip, subjected to indignities and expense, to his great damages \$10,000, for which he sues and demands a trial by jury."

The demurrer assigned, beside other causes, the following: (1) "Defendant says that as a matter of law the declaration sets forth no cause of action against it, for the reason that there is no allegation that the defendant, or its agents, breached any contract entered into between it and the plaintiff." (2) "The declaration fails to aver that the Pullman Company failed to furnish the sleeping car accommodations contracted for." (3) "The declaration fails to aver that the sleeper upon which plaintiff was being carried was not taken through over the lines of the railroads according to the route indicated by the railroad transportation which the plaintiff alleges he exhibited to the agent of the defendant." (4) "The declaration does not allege that he was put off the car by the Pullman Company or its agents. On the contrary, it alleges that he was put off by the agents of the railroad company, for a defect in his railroad transportation." (5) "The declaration alleges that the plaintiff being a holder of a railroad ticket which entitled him to be carried over the Pennsylvania R. R. from New York City to Washington City, and thence over connecting lines to Chattanooga, Tennessee, and which was required to be countersigned at New York, which ticket he exhibited to the agent of the Pullman Company in order to procure a sleeping car berth; that the agent of the Pullman Company informed him that the railroad ticket could be countersigned at Washington as well as at New York; but said declaration fails to allege any authority upon the part of the agent of the Pullman Company to pass on the regularity of the railroad ticket held by the plaintiff. It fails to allege that it was the duty of the Pullman Company, or its agent, to countersign the railroad ticket, or to pass on its validity.

Carroll & McKellar, for plaintiff in error.

Thomas H. Jackson, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

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SEVERENS, Circuit Judge (after stating the facts as above).

The demurrer admits all facts well pleaded in the petition, and the question is whether the information given to the plaintiff by the defendant's agent of whom he purchased his sleeping berth ticket, that he could get his transportation ticket countersigned at Washington instead of New York, bound the defendant as by a guaranty that the railroad company should transport him to Washington without his ticket being countersigned at New York. The solution of this question depends upon the relation of the sleeping car company and the railroad company, and their respective relations to the passenger. These relations are well known to the public, and recognized by the courts.

The railroad company is the carrier and is the party with whom the passenger contracts for his transportation. Among other things it contracts to supply him with the usual conveniences for his comfort while being transported. The parlor or sleeping car company's business is to provide the passenger with certain conveniences and comforts which are in addition to those contracted for by the railroad company. Those duties to the passenger which are incident to the carrier's contract for transportation continue to rest upon the railroad company, notwithstanding he may have another contract with the sleeping car company for special accommodations. The use of the car for carrying the passenger is a matter for arrangement between the companies. The railroad company retains the power of control and management of its trains including the sleeping cars as to all matters except those which are peculiarly incident to the other company's special contract with the passenger. The duties of the sleeping car company to the passenger are coextensive with the nature of its contract. It does not undertake those which belong to the railroad company. The compass of the duties which belong to each company is defined by this demarcation. It follows that the obligation of the sleeping car company must be dependent upon the contract which the passenger is expected to have with the railroad company. And, since it has no control over that or its execution, it is not responsible for the manner in which it is carried out. These propositions express, as we think, the doctrine generally held upon this subject, and seem to be the logical relation of the law and facts. *Duval v. Pullman's Palace Car Co.*, 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715; 23 U. S. App. 527; *Paddock v. Atchison, T. & S. F. R. Co.* (C. C.) 37 Fed. 841, 4 L. R. A. 231; *Campbell v. Pullman Car Co.* (C. C.) 42 Fed. 484; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *The Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *Chicago, etc., Railroad Co. v. Pullman Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97. We have not been able to find that the Supreme Court has ever passed directly upon

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such a question as we have before us. But the reasoning in the discussions in the three cases last cited throws some light upon the relations between railroad companies and other companies which it permits to enjoy the privilege of furnishing additional conveniences to the public by the use of its own facilities. The deduction seems clear that in doing this the railroad company relinquishes none of its own powers and rights, and is not absolved from its own obligations to the public as a common carrier.

The plaintiff relies much upon the case of Pullman's Palace Car Co. v. King, 99 Fed. 380, 39 C. C. A. 573. But the facts of that case are distinguishable. The passenger exhibited to the defendant's agent a transportation ticket from New Orleans to New York, the last coupon of which was for passage from Washington to New York by the Baltimore & Ohio Railroad, and asked for a sleeping car ticket to correspond. The agent sold him one in a sleeping car which did not run from Washington to New York by the Baltimore & Ohio, but by the Pennsylvania Railroad, from which he was ejected after leaving Washington for refusal to pay his railroad fare. The court held that the defendant guaranteed that the car in which was the berth sold was one which would go by the Baltimore & Ohio Railroad, and that it was liable for this breach of contract.

It was therefore beyond the sphere of the Pullman Company's business to negotiate with the plaintiff in regard to the manner in which his contract with the railroad company should be performed, and its agent at Providence had no authority to make any stipulation for it in that regard. The plaintiff was bound to know what the usual course of business is in such matters, and that the sleeping car company would not guarantee the manner in which the railroad company should perform its contract with him, and that the information which he says the agent gave him, that it was not necessary for him to get his transportation ticket countersigned at New York, and that he could have it done at Washington, could amount to no more than the agent's personal opinion upon the subject.

We have this far considered the case as if it were alleged that the defendant's agent had undertaken to make a guaranty in behalf of the defendant with the plaintiff in regard to the rights of the plaintiff under his contract for transportation. But it is doubtful whether the petition in the face of the demurrer can be held to amount to an allegation that there was any such guaranty. It is therein alleged that "the aforesaid agent of the defendant examined the aforesaid railroad ticket, and informed him that it was not necessary for him to go to New York for the purpose of having his ticket countersigned." It is then stated that "upon the assurance given by the agent" he purchased the sleeping car ticket; and again that upon the assurance "and the

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warranty that upon his aforesaid railroad tickets and the sleeping car ticket he would have the right" to occupy the berth, etc., he became a passenger upon the car. It is evident in using the words "assured" and "guaranty" nothing else is referred to than the previously mentioned information by the agent, for there is nothing else stated to have been assured or warranted. However, we will put our decision upon the broader ground that the plaintiff was not entitled to treat the representation of the agent as a contract of the defendant company. The opinion of the court below was in harmony with the view we have expressed. We think the court was right in sustaining the demurrer.

The judgment must be affirmed, with costs.

LIABRAATEN v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of Minnesota, July 31, 1908.)

[117 N. W. Rep. 423.]

Railroads—Accident at Crossing—Duty to Look and Listen.*—Howe v. Railway Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616, to the effect that the rule requiring a person, before crossing a railroad track, to look and listen for approaching trains, is not applicable in all its force to a passenger in a vehicle, who has no control over the driver or his management of the team, followed and applied.

Same—Contributory Negligence.*—The mere fact that a passenger in such a vehicle could, had he looked or listened, have noticed an approaching train, is not conclusive that he was guilty of negligence in failing to do so.

Same—Evidence—Negligence.—Evidence examined, and held sufficient to justify the jury in finding negligence on the part of defendant, and, further, that the record presents no reversible error.

(Syllabus by the Court.)

Appeal from District Court, Stearns County; M. D. Taylor, Judge.

*See first foot-note appended to Holden v. Missouri R. Co. (Mo.), 13 R. R. R. 440, 36 Am. & Eng. R. Cas., N. S., 440.

For the authorities in this series on the subject of imputed negligence, see foot-note appended to Cornovski v. St. Louis Transit Co. (Mo.), 27 R. R. R. 37, 50 Am. & Eng. R. Cas., N. S., 37; foot-note appended to Shultz v. Old Colony St. Ry. (Mass.), 25 R. R. R. 782, 48 Am. & Eng. R. Cas., N. S., 782; Baker v. Norfolk & S. R. Co. (N. Car.), 25 R. R. R. 760, 48 Am. & Eng. R. Cas., N. S., 760; foot-note appended to Thompson v. Pennsylvania R. Co. (Pa.), 25 R. R. R. 695, 48 Am. & Eng. R. Cas., N. S., 695; Cotton v. Willmar & S. F. Ry. Co. (Minn.), 25 R. R. R. 501, 48 Am. & Eng. R. Cas., N. S., 501; foot-note appended to Southern Ry. Co. v. King (Ga.), 24 R. R. R. 785, 47 Am. & Eng. R. Cas., N. S., 785.

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Action by Gina Liabraaten against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Reynolds & Rocser (A. H. Bright, of counsel), for appellant.
Stewart & Brower, for respondent.

BROWN, J. Action for personal injuries, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or for a new trial.

The facts, briefly stated, are as follows: Plaintiff, an unmarried woman of the age of 23 years, resided about three miles from the village of Brooten, Stearns county, through which village extends a line of defendant's railroad. She had resided in this vicinity for a number of years, and was a frequent visitor to the village, in going and returning to which it was necessary to pass over defendant's railroad tracks. On the night of the injury here complained of she accompanied her father, a man of mature years, to Brooten to attend church. They came to town in a buggy drawn by a single horse, driven by and under the control of the father. At the conclusion of church services they started for home in the same vehicle, the horse driven and controlled as before by the father. Their route, as already mentioned, took them, both going and returning, across the railroad track as it extended over Central avenue in the village. When they reached the railroad track, and were crossing it, a train operated by defendant collided with them, demolishing the buggy, killing the father, and seriously injuring plaintiff. This action was brought to recover for her injuries, on the claim that they were caused by the actionable negligence of defendant. She charged in her complaint that defendant was negligent because (1) of the excessive speed of the train; (2) the failure of defendant's employees in charge thereof to give the customary signals of its approach; and (3) the failure of defendant to construct and maintain gates or guards at the street intersection. The defense, in addition to controverting the allegations as to the nature and character of plaintiff's injuries and a denial of negligence on the part of defendant, was that plaintiff was guilty of contributory negligence and could not recover. All the issues presented by the pleadings were submitted to the jury, and a verdict returned in plaintiff's favor for \$9,500, which the trial court ordered reduced to \$7,500.

Several questions are presented by the assignments of error, which we will consider in the order stated in the briefs.

1. Defendant at the trial requested the court to direct a verdict in its favor on the ground that there was no evidence sufficient to take the question of its negligence to the jury. A refusal of this request is assigned as error. We discover no error in this ruling. Brooten, the place of the accident, is a small

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village of about 400 population, and the railroad track extends over its main street at grade and at an angle of about 40 degrees. The accident occurred at about 9 o'clock in the evening, and, the day being Sunday, there were perhaps few people upon its streets. But the evidence shows that the crossing, by reason of the situation of buildings and surroundings, is a dangerous one, requiring on the part of the railway company, as well as on the part of the pedestrians, care commensurate with the situation to avoid accidents. The evidence further shows that defendant's train, its fast Winnipeg express, was running at the time of the accident between 50 and 60 miles an hour, and that the usual signal of its approach by ringing the bell of the engine was not given. While we should not feel justified in holding that the operation of defendant's train through a village of the population of Brooten at the rate of speed referred to constitutes negligence as a matter of law, still the speed of the train, coupled with the failure to ring the bell of the engine, was sufficient to justify the jury in declaring a failure on the part of defendant to exercise a proper degree of care for the safety of the traveling public, notwithstanding the undisputed fact that the engine was equipped with an unusually brilliant headlight. The court was therefore justified in submitting the question to them. *Cotton v. Railway Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422.

2. The principal question discussed by counsel for defendant, both in the brief and on the oral argument, is the claim that plaintiff was guilty of contributory negligence. A careful examination of the evidence presented in the record, in the light of the previous decisions of the court in similar cases, leads to the conclusion that the verdict of the jury on this branch of the case cannot be disturbed. The argument in support of the theory that plaintiff was guilty of contributory negligence is based upon the rule stated in *Cunningham v. Railway Co.*, 84 Minn. 21, 86 N. W. 763, and again in *Cotton v. Railway Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, that a person situated as plaintiff was on this occasion, riding in a vehicle as the guest of another, who is the owner and driver, is, notwithstanding he may in a measure rely upon the driver to avoid accidents, nevertheless required to exercise a proper degree of care for his own safety, and that any negligence on his part, irrespective of the negligence of the driver, which contributes to bring an injury upon him, precludes recovery. The evidence does not bring the case within this rule, but does bring it within the case of *Howe v. Railroad Co.*, 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616.

For a correct understanding of defendant's position a further statement of facts is necessary. Central avenue, in the village of Brooten, as already stated, crosses the railroad track at an

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angle of about 40 degrees. The avenue runs in a northwesterly and southeasterly direction, and the track extends east and west through the village. The train in question was approaching from the east, and plaintiff was going in a northwesterly direction, so that the train was at her right. The right side of the street from the church building to the railroad right of way is entirely occupied with buildings, and the view of the railroad track from that direction is thereby completely obstructed. From this point the depot and elevator buildings and a number of cars standing on a side track to the east obstructed the view until plaintiff's vehicle was within 35 feet from the main track. At that point there was a clear view of the track past the depot in an easterly direction for about 600 feet. So that if plaintiff or her father, as they approached the track, had then looked to the east, they would have noticed the approaching train; the engine being equipped with a very powerful headlight. Defendant established this situation by reasonably clear evidence, and the only claim made in behalf of plaintiff in refutation of the contention that she could have seen the train, had she looked at the point stated, is that there were obstacles in the form of boxes and trucks for the carrying of baggage upon the depot platform which further obstructed the view. There is no evidence in the record that the father looked for an approaching train before driving upon the track, and it is reasonably clear that, if he had looked, he would have seen the train. Nor is there any evidence that plaintiff looked or listened, or made any effort to cause her father to do so. She testified on the trial that, in reference to the accident and all matters happening from the time she left the church up to about three days after the accident, her mind was a blank; that she had no recollection of any event occurring between these dates, and could not say what efforts she or her father made for their safety. Defendant offered no evidence tending to show the contributory negligence of plaintiff, save that she could have seen the train, had she looked at the point 35 feet from the main track; and it is urged that this was sufficient and cast upon her the burden to free herself from the charge of failing to exercise proper care for her safety. In this we are unable to concur. The facts bring the question within the rule of the *Howe Case*, which we follow and apply. The negligence of the father is not imputed to her, and she had the right, there being no suggestion that he was not a competent driver, to rely in a measure upon him to avoid coming into collision with the train as they passed upon the railroad track.

We can do no better in disposing of this branch of the case than to quote from Judge Mitchell's opinion in the case referred to, where this precise situation was under consideration, except that in the *Howe Case* the view of the track at a point 170 feet

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therefrom was clear and unobstructed for a distance of 1,500 feet or more. In the case at bar the view of the track was wholly obstructed until within 35 feet distant therefrom. In the Howe Case it was said: "We think it would hardly occur to a man of ordinary prudence, when riding as a passenger with a competent driver, who he had no reason to suppose was neglecting his duty, that he was required, when approaching a railroad crossing, to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team. And our conclusion is that a court cannot hold, as a matter of law, that a passenger having no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in looking and listening, on approaching a railroad crossing which is required of one having the control and management of the team. It is a matter of common knowledge that under ordinary circumstances passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railroad crossing, and we do not think that the courts are justified in adopting a hard and fast rule that they are guilty of negligence in doing so. Every case must depend largely upon its own particular facts."

The fact that plaintiff was familiar with the location and her surroundings does not change the rule. In order to charge a person situated as plaintiff was with contributory negligence, something more than ability to see an approaching danger and a failure to look must, within the Howe Case, be shown. What will constitute negligence in such a case, as a matter of law, we need not determine. Each case must stand on its own facts. That the question was proper for the consideration of the jury is also sustained by the following cases: *Johnson v. Railway Co.*, 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; *Finley v. Railway Co.*, 71 Minn. 471, 74 N. W. 174; *Lammers v. Railway Co.*, 82 Minn. 120, 84 N. W. 728.

3. A number of assignments of error challenge the correctness of certain rulings of the court in the admission of evidence. We have examined them with care, and find no prejudicial error. The same may be said with reference to exceptions to the charge of the court and the refusal of some of defendant's special requests. The charge as a whole was fair and complete, and covered all questions presented by the evidence. The special requests were, so far as proper, fully covered, and there was no error in the refusal separately to give them to the jury.

4. It is also urged that the damages are excessive, and that a new trial should be awarded for that reason. The jury awarded \$9,500, which the trial court ordered reduced to \$7,500. Our conclusion on this branch of the case sustains the action of the

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trial court. We are always more or less embarrassed by questions of this kind. We are presented with the cold record, with no opportunity of judging the credibility of expert witnesses by their presence and personal demeanor, nor of observing from the appearance of the injured party the real nature of the injuries complained of, and we must, necessarily, rely largely upon the opinion of the trial court. The fact that in the case at bar an able, fair, and conservative trial judge has declared that in his opinion the sum of \$7,500 is not disproportionate to the injuries plaintiff received removes whatever doubts a careful reading of the evidence may have created in our minds.

Order affirmed.

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(Circuit Court of Appeals, Eighth Circuit, November 25, 1907.)

[159 Fed. Rep. 10.]

Negligence—Contributory Negligence—Acts in Emergencies.*—

Where a person without fault on his part is brought suddenly into a situation of imminent danger, he is not chargeable with culpable negligence because he fails to take the best means of escape, and the party whose negligent act brought him into such perilous situation is not relieved from liability for his injury if he acts as a person of ordinary prudence might have done under the same circumstances.

Railroads—Accident at Crossing—Contributory Negligence.*—

Where plaintiff and another driving a horse approached to within 25 feet of a railroad crossing, well known to them to be dangerous, at a trot, and even there could not see along the track for more than 50 to 150 feet nor hear signals given by an approaching train because of an intervening bluff and an adverse wind and the noise made by their vehicle, their action in driving upon the crossing without stopping to look and listen was negligent, and precluded plaintiff from recovering damages from the railroad company for an injury received by jumping out of the vehicle to avoid danger from an approaching train which they did not see until the horse had stepped upon the track.

Negligence—Imputed Negligence—Persons Driving Together.†—

That a plaintiff at the time of his injury at a railroad crossing was riding in a vehicle with a friend who owned the horse and was driving

*See second foot-note appended to *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 27 R. R. R. 500, 50 Am. & Eng. R. Cas., N. S., 500; second foot-note appended to *McCallion v. Missouri Pac. Ry. Co.* (Kan.), 26 R. R. R. 178, 49 Am. & Eng. R. Cas., N. S., 178; *Maysville, etc., R. Co. v. McCabe's Adm'x* (Ky.), 26 R. R. R. 107, 49 Am. & Eng. R. Cas., N. S., 107.

†See foot-note appended to *Cornovski v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 37, 50 Am. & Eng. R. Cas., N. S., 37; foot-note ap-

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did not relieve him from the duty of exercising ordinary care to avoid injury, and where he sat beside the driver, and make no objection when the latter negligently drove upon the track in front of an approaching train, such negligence is imputable to him.

In Error to the Circuit Court of the United States for the District of Kansas.

Robert J. Brock, for plaintiff in error.

Paul E. Walker (*M. A. Lowe*, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILLIPS, District Judge.

PHILLIPS, District Judge. The plaintiff in error (hereinafter designated the plaintiff) sued the defendant in error (hereinafter designated the defendant) to recover damages for personal injuries. As the trial court at the close of the plaintiff's evidence directed a verdict for the defendant, a review of the case made is rendered necessary.

The plaintiff, a man of middle age, and one Pfeutze, resided in the town of Manhattan, Kan., a few miles distant from the crossing of the public highway over the track of the defendant railroad company where the accident in question occurred. On the morning of October 16, 1904, they left home in a two-seated rig drawn by one horse belonging to said Pfeutze, the latter driving, to visit some point in the country of mutual interest. They were close personal friends, and so traveled together in companionship. They approached the crossing in question from a northeasterly direction, the roads intersecting each other at high angles. A bluff from 150 to 200 feet high arose just west of the crossing, extending back some distance, cutting off the view of a train of cars coming from the west when the traveler approached this crossing, under conditions hereinafter disclosed. It was regarded as a very dangerous railroad crossing, a fact well known to the plaintiff and Pfeutze. They were quite familiar with this situation, having used this crossing frequently for a number of years. They admitted that as they approached the crossing they were engaged in general conversation, and trotted the horse to within 20 or 25 feet of the crossing before the driver slowed him to a walk. They did this when, according to their testimony, they knew that at a distance of about 30 feet from the track they could not see a train coming through

pendent to *Shultz v. Old Colony St. Ry.* (Mass.), 25 R. R. R. 782, 48 Am. & Eng. R. Cas., N. S., 782; *Baker v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 760, 48 Am. & Eng. R. Cas., N. S., 760; foot-note appended to *Thompson v. Pennsylvania R. Co.* (Pa.), 25 R. R. R. 695, 48 Am. & Eng. R. Cas., N. S., 695; foot-note appended to *Southern Ry. Co. v. King* (Ga.), 24 R. R. R. 785, 47 Am. & Eng. R. Cas., N. S., 785.

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the cut from the west a greater distance than 50 feet; though the actual measurement and experiments made demonstrate that 34 feet back from the track a train could have been seen at a distance of about 90 feet. At a distance of 15 feet from the crossing the proof showed that the train could be seen 232 feet. They comprehended the fact on approaching the point of intersection that a train might appear at any time, and therefore they testified that in approaching the crossing they looked and listened therefor; that hearing no signal they drove onto the track without stopping; and just as the horse's forefeet reached the north rail the plaintiff observed the train coming, when the driver applied the whip to the horse and safely cleared the crossing before the engine arrived. The plaintiff, taking alarm, sprang from the vehicle, alighting on the south side of the track, and in the fall received injury to one of his knees, more or less serious, for which injury this action was instituted. If the plaintiff's own negligence or want of due care did not contribute to bringing him into such perilous situation, it is to be conceded that his act in leaping from the vehicle, although he would not have been injured had he remained seated, would not disentitle him to maintain action for damages. When a person, without fault on his part, is brought suddenly into a situation of imminent danger, not admitting of opportunity for the exercise of deliberate judgment as to the better means of escape, culpable negligence is not to be imputed to him for not selecting the better course. If under such circumstances he makes such choice as a person of ordinary prudence placed under like conditions would make, and injury thus comes to him, it would not relieve the party from accountability therefor whose negligent act brought him into such perilous situation. *Omaha Water Company v. Schamel*, 147 Fed. 502, 78 C. C. A. 68, loc. cit. The same may be said of the action of Pfeutze in not pulling his horse back off the track when he discovered the approach of the train if his forefeet were already over the first rail, provided he was not guilty of contributory negligence.

The actionable negligence of the defendant charged in the petition is as follows: In propelling said train over said crossing without ringing the bell or sounding the whistle, and without giving or attempting to give any sufficient warning or signal of its approach, when the defendant well knew that it was a most dangerous crossing, and that the ordinary warning of the bell and whistle would be wholly ineffectual to protect persons entering upon said crossing; and in approaching said crossing at a dangerous rate of speed; and failing to maintain a watchman and gates at the crossing, and not providing proper signals giving notice of the approach of trains.

The plaintiff knew that neither watchman nor gates, nor appliances for signals, were kept and maintained at said crossing.

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Of what avail would the presence of a watchman to operate gates have been in view of the plaintiff's evidence? As the train was not running on schedule time, being about three hours late, a watchman would not have known the moment of its coming. And as the plaintiff and Pfeutze, if they are to be credited, notwithstanding their vigilance, did not discern the approach of the train until the horse was on the near rail, it must be conceded that the watchman, if there, would have been in the same predicament in giving timely warning. If it be said that he could have warned them not to enter upon the track without first stopping, the answer is that they already possessed the same knowledge as would the watchman, that the place itself was a warning of danger, and therefore they should have stopped with or without such outside warning. Any warning by a watchman would have conveyed to them only what they already knew as well as he did. If they could not hear any signals the watchman could not have heard any. They therefore had the same reason for stopping before entering upon the crossing that the watchman would have had for warning them to do so. They knew, on approaching this crossing, that no appliances were employed there by the railroad company for giving signal of the approach of a train, and therefore that they could not rely thereon for their protection and safety. All the more, therefore, should they have depended upon their quickened senses and increased precaution in approaching the crossing.

The allegation respecting the dangerous rate of speed of the train is not supported by any evidence that would have warranted the jury in finding the existence of such fact. The only witness to this issue was one Cooper, who, according to his statement, was about 150 yards northeast of the crossing, following on the same road in the rear of the plaintiff. Remarkably enough, in view of the plaintiff's evidence that they could not see the crossing until they were within about 30 feet of it, this witness claimed that he saw the train 150 yards to the northeast, when it was about 50 feet from the crossing, although he did not see the accident. Indisputably, he had but a mere glimpse of one or two seconds of the train. From which it is manifest that any expression of opinion by him as to its rate of speed was the merest speculation and guesswork. He said he thought it was running from 40 to 45 miles an hour. There was nothing whatever at the instant to fix his mind upon the matter of the speed, and his cross-examination developed that he had never experimented from a side view to determine the rate of speed of a passing train. As said in *McGrail v. McGrail*, 48 N. J. Eq. 532-536, 22 Atl. 582, 584:

"Nothing is more uncertain and unreliable than the testimony of witnesses as to the time occupied in a transaction."

Recognition of such mere guesswork as sufficient to carry the

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question to the jury of the rate of speed of a train has a long column of injustice to its account. This testimony, doubtless, and properly so, was treated as utterly worthless by the experienced judge who presided at the trial.

The only remaining ground of negligence worthy of consideration is the imputed failure of the defendant to sound the whistle or ring the bell when approaching the crossing. The statute of the state requires that one or the other of such signals should be given at least 80 rods from such public road crossing. The evidence on behalf of the plaintiff was that although they listened they did not hear such signal, as did also the witness Cooper. But the plaintiff's testimony was that on account of the obstruction of the long, high bluff and the adverse direction of the wind blowing at the time they might not have heard the sounds if given. The petition itself alleges that the defendant, on approaching this crossing, knew that "the ordinary warning of the bell and whistle would be wholly ineffectual to protect persons crossing the said crossing;" and in the brief of counsel for plaintiff it is admitted that "by reason of the obstruction caused by the bluff it was impossible for them to hear the train until it was dangerously close." In view of the rule of law that the servants of the defendant are presumed to have performed their duty in respect of giving the required signal, it devolved upon the plaintiff to overcome this presumption by satisfactory evidence to a reasonable mind. When the plaintiff himself thus, in effect, conceded that the whistle or bell, if sounded, probably would not have reached such traveler, it is somewhat remarkable that he should assume the position that he is entitled to recover damages by reason of the failure of the defendant to have given such signal, when the burden of proof rested upon the plaintiff to establish such omission by satisfactory evidence. If, however, this doubt should be resolved in favor of the plaintiff, what of the conduct of these travelers in approaching the crossing as they did? With full knowledge of the situation, as hereinbefore stated, they approached the crossing engaged in general conversation, indicating that their minds were not fixed upon the probable approach of a train and giving heed to any sounds, on a slight down grade they suffered the horse to trot until they reached within 20 or 25 feet of the railroad track, and then in a walk entered upon the crossing without taking the precaution to stop; when, according to their statement, from the point where they stopped trotting, it was almost a physical impossibility for them to have discovered the approach of a train from between 50 and 100 feet away. Courts will take judicial cognizance of physical facts of common knowledge. Judges know without evidence taken that the clatter of a horse's hoofs on a road when trotting, and a vehicle thus in motion, under the most favorable circumstances, will make such an amount of noise as will obstruct the

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conveyance of sounds to the ear—that they lessen the chances of hearing distinctly. And therefore, on approaching a known place of danger at a railroad crossing, they should exercise a degree of care commensurate with the hazard to be encountered demanded of them, and, where both the senses of vision and hearing were thus obstructed, they should take the next ordinary, practical, and sensible course of stopping to look and listen. Instead of doing this, they drove onto the track; and in this connection it is important to note the evidence on behalf of the plaintiff. It is that when they first discovered the engine it was within 120 feet of them, and at that time the forefeet of the horse were over the first rail of the track. The uncontradicted evidence is, demonstrated by actual measurements and observations since made, that at a distance of 34 feet from the track an engine from the west could be seen 90 feet, and at a distance of 15 feet from the track the engine could be plainly seen 232 feet. Physical facts, it has been pungently said, never lie, but witnesses sometimes do. If the plaintiff and Pfeutze did not discover, as they testify they did not, the engine until it was within about 120 feet of them, it is clear proof that they were not looking for the engine when they drove onto the track; and that had they discovered it, as they should have done in the exercise of due vigilance, when it first came in view, the horse could have been readily stopped before entering upon the railroad track, or they would have had ample time to have passed clear of the track. The law is that in the absence of any tangible proof, as we have shown, of the rate of speed of the train, the presumption must be indulged that the engineer approached the crossing with due care, measured by a conscious sense of the danger that might likely be encountered there, and that after discovering the presence of the vehicle he did not recklessly run it down.

Pfeutze, touching this matter, testified as follows:

“Q. At a point up the road from where you came beyond twenty-five feet from the crossing, what could you observe in the direction of the railroad? A. Hardly nothing at all, except right at the crossing in front of the horse.”

He further said:

“We expected a train from the west.”

It is to be conceded, it seems to us, that under such conditions common prudence dictated that it was careless to recklessness to trot on even a slight down grade up to within 25 feet of the track, and then walk immediately onto it without stopping to look and listen. Had he done so the injury would have been avoided beyond question. It is not a sufficient answer to this to say that the parties might have reasonably considered that, if they did stop and satisfy themselves that no train was in view and then proceeded, still they might have been caught before accomplishing the crossing. This suggestion, it seems to us, could

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be with equal logic employed in any instance where the party thus injured had failed to stop and listen. From a point known at the time to plaintiff and Pfeutze where the horse could have been stopped in safety, they could see the engine over 200 feet away, just as they did see it when the horse was in motion at the north rail of the track; so that the stubborn fact remains that if they had stopped for three or four seconds this lawsuit would have been avoided. Judge Day, sitting with Judges Lurton and Severens, in *Shatto v. Erie Railroad Company*, 121 Fed. 678-682, 59 C. C. A. 1, speaking to such suggestion, said:

"It is argued that it would have done no good to stop and listen. We cannot agree to this supposition; certainly not to the extent of exonerating the plaintiff from using the precautions obviously necessary for his protection, because they could not have changed the result. We think it only reasonable to suppose that, had he stopped and listened with open ears before going between the open cars, he would have heard the noise of the approaching train. Had he halted for a moment before going between the cars, the train would have passed in safety."

Chief Justice Doster, in *A., T. & S. F. Railway Company v. Willey*, 60 Kan. 819-825, 58 Pac. 472, 473, discussing a germane question, said:

"The pertinent facts, then, are that the plaintiff below could not see the approaching train because of obstructions to his view, nor could he hear it because of the noise of the wind in the grove of trees. He was, however, familiar with the crossing and all its surroundings. He knew that a train was liable to pass at any time. He knew that he could neither see nor hear its approach. He could, however, have seen or heard it if he had stopped just before his team passed to the end of the hedge nearest the track, which point was 28 feet from the nearest rail. He knew that he could not, for the reasons stated, either see or hear an approaching train without stopping at or about the end of the hedge. Under these circumstances the legal proposition of his obligation to stop, in order to assure himself of safety, is unquestionable. The law first laid him under the obligation to look and listen. This is undisputed. The exercise of the senses of sight and hearing were unavailing, and were known by him to be unavailing. The very contingency, then, in which the law laid him under the necessity of further precaution arose."

This rule has been again recognized by the Supreme Court of Kansas in *C., R. I. & P. Railway Company v. Palmer*, 61 Kan. 860, 60 Pac. 736, *Walker, Receiver, v. Mercer*, 61 Kan. 736-737, 60 Pac. 735, and in the recent case of *M., K. & T. Railway Company v. Jenkins*, 74 Kan. 487, 87 Pac. 702.

We are not called upon in this case to approve of the extreme proposition laid down by so distinguished a judge as Mr. Justice Sharswood in *Railroad Company v. Beale*, 73 Pa. 504, 13 Am.

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Rep. 753, "that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se, and a question for the court." The duty to stop is a relative one. It depends upon the situation of the particular case, the knowledge the traveler has of the situation, and the reliance he may reasonably place under the circumstances on his opportunities for seeing and hearing without taking the last precaution of stopping. The authorities are quite in accord on the proposition that if the view is unobstructed so that an approaching train, before it reaches the crossing, can be seen, there is no occasion for the special exercise of the sense of hearing—listening; and therefore there is no reason why he should stop for that purpose. On the other hand, if the view is obstructed, interfering with the sense of sight, then he must bring into requisition the sense of listening carefully and attentively. And if there is any noise or confusion over which he has control, such as that of the noise of the horse's feet, or the grinding sound of the wheels, or the ordinary noise of the vehicle, interfering with the acuteness of the sense of hearing, it is his duty to stop such noise or interfering obstruction and listen for the train before going upon the track.

Mr. Chief Justice Alvey, in *Railroad Company v. Hogeland*, 66 Md. 149-161, 7 Atl. 105, 59 Am. Rep. 159, said:

"It is negligence per se for any person to attempt to cross tracks of a railroad without first looking and listening for approaching trains; and, if the track in both directions is not fully in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross. Especially is this required where a party is approaching such crossing in a vehicle, the noise from which may prevent the approach of a train being heard. And if a party neglects these necessary precautions, and receives injury by collision with a passing train, which might have been seen if he had looked, or heard if he had listened, he will be presumed to have contributed, by his own negligence, to the occurrence of the accident. * * * This is the established rule, and it is one that the courts ought not to relax, as its enforcement is necessary as well for the safety of those who travel in railroad trains as those who travel on the common highways."

So in *Chase v. Railroad*, 167 Mass. 383, 45 N. E. 911, it is said:

"If there is anything to obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety."

Quite opposite to the case in hand is that of *Seefeld v. C., M. & St. P. R. Company*, 70 Wis. 216-222, 35 N. W. 278, 5 Am. St. Rep. 168, where the plaintiff drove toward a crossing where his

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view was obstructed, and the wind was blowing, and there were vehicles present which may have rendered hearing more difficult, the plaintiff being familiar with the dangerous condition of the crossing, and with knowledge that a train might be expected to pass at any moment. Mr. Justice Lyon, after full consideration of the authorities, approved the action of the trial court in directing a verdict for the defendant. He concluded by saying:

"The rule to be deduced from these cases is this: If the view of the traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows a train is due at such crossing at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force and direction of the wind or of noises in the vicinity, whether made by his own wagon or by other causes, ordinary care requires him to stop his team while he may do so, and listen for the train."

In *Shufelt v. Flint & P. M. R. Company*, 96 Mich. 327, 55 N. W. 1013, the court said:

"These trains must run where the view is obstructed by cuts, by embankments, by trees, and by other things. He who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence."

In *Henze v. St. L., K. C. & N. Ry.*, 71 Mo. 640, the evidence on the part of the plaintiff showed that with his infant child he was driving in a two-horse wagon, at a slow walk, along a highway where it crossed the railroad, when they were run over and killed by an extra train not running on time. The evidence tended to show that while no whistle was sounded or bell rung, the train made such noise that it could have been heard if the party had stopped and listened. Judge Henry said:

"If Henze had used the precaution which common prudence dictates, it is not likely that the calamity would have occurred. If he had stopped to look and listen when near the track, and could neither see nor hear the approaching train, on account of the cut or other obstructions, and no signal was given from the train, he would have been justifiable in attempting to cross, and no negligence would have been imputable to him. But he had no right to drive along over a dry, hard road in a two-horse wagon, the noise of which might prevent him from hearing an approaching train, and, without stopping an instant to see or hear, go upon the railroad track, except at his own peril."

In *Stepp v. C., R. I. & P. Ry. Co.*, 85 Mo. 235, Judge Black said:

"If the crossing is obstructed from view increased caution is required on the part of the traveler as well as the company, and if, from noise, such as a gale of wind, or the rattling of a wagon, hearing is rendered difficult, then it would become the duty of the traveler to stop and listen."

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In *Merkle v. Railway Company*, 49 N. J. Law, 473, 9 Atl. 680, the court, speaking of a case where the party is approaching the crossing with a wagon loaded with boxes and bottles, where he could not see an approaching train until within a few feet of the track, said:

"Inasmuch as he could not see an approaching train at any considerable distance from the track, ordinary prudence required him to stop when he was near enough to the railroad to ascertain, at least by listening, whether there was any danger or not."

In *Blackburn v. So. Pac. Ry. Co.*, 34 Or. 215, 55 Pac. 225-229, the court, speaking of the instance where the noise of a wagon over hard streets, more or less rocky, would interfere with the sense of hearing, said:

"Ordinary care required that he stop the noise by stopping the wagon when he was near enough to the track to determine by listening whether there was danger or not. It is true the evidence indicates that his team was brought to a walk; but, notwithstanding this, the noise from the wagon and horses' feet was necessarily sufficient to interfere with the effective use of the sense of hearing. If they had been brought to a full stop, there would have been no disturbing sound which the plaintiff could control; and, under the circumstances, we think he was bound to exhaust this source of information."

This court in *Denver City Tramway Co. v. Norton*, 141 Fed. 599, 607, 608, 73 C. C. A. 1, speaking to the instance where the view of an approaching street car was obstructed, said that the "general rule in respect of the driver of a vehicle in approaching a railroad crossing—a known place of danger—requires that he should stop and listen where his view is cut off." We are mindful of what is said by the Supreme Court in *Grand Trunk Railway Company v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, respecting the duty of a traveler to stop before driving a railroad crossing. The question before the court in that case was predicated of an instruction asked by defendant below, which it was held was properly refused because it confined the consideration of the jury to a few particular enumerated circumstances and excluded others of equal importance.

The facts in the case at bar were palpable and undisputed. On them the law pronounced the judgment without any finding of fact by the jury. The case presented by the evidence is one where it is admitted in argument of counsel that the signals required by the statute to be given would not, probably, have reached the plaintiff, because of the obstruction of a bluff nearly 200 feet in height and extending back some distance, with the wind blowing in such direction as rather to have taken the sound away from the ears of the travelers, with no view of an approaching engine until within some 30-odd feet of the track

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to have afforded them any reasonable opportunity to avoid a collision if a train was at hand; they approached the point in a trot to within 20 or 25 feet of the track, and, without stopping, walked immediately into the hazard rather than lose 3 or 4 seconds of time, when and where, without alighting from the vehicle, they would have seen the train coming over 200 feet away, and thus have avoided the accident.

The final contention on behalf of the plaintiff is that he cannot be held to have been guilty of contributory negligence, for the reason that the conveyance belonged to Pfeutze, and was being driven by him. Reliance for this position is based principally upon the case of *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. In that case it was held that a person who hires a hack and gives the driver directions as to his destination, and exercises no other control over the conduct of the driver, is not responsible for his acts of negligence, or prevented from recovering against the railroad company for injuries suffered in a collision of the hack with a train, caused by the concurring negligence of the managers of the train and of the driver. This is based upon the proposition that such a hack driver is not the agent of the passenger, over whose conduct and action he has no right of control, and whom he does not undertake to direct. In the case at bar the plaintiff did not hire the conveyance and the driver to carry him to his destination; but they were traveling together in companionship in Pfeutze's vehicle on a mission of mutual interest, the plaintiff having as much right as Pfeutze to direct their course. Under the facts of this case, the relation that plaintiff sustained to his companion, Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion, without a word of warning or protest. It is now the better recognized rule of law that as to such a person situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon a mutual adventure, it is as much his duty as that of the driver to take observation of dangers, and to avoid them, if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury. As said by the Supreme Court of New York in *Brickell v. N. Y. C. & H. R. Co.*, 120 N. Y. 290-294, 24 N. E. 449, 450, 17 Am. St. Rep. 648:

"The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an inclosure, and is without opportunity to discover danger and to inform the driver of it.

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It is not less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger, and avoid it if practicable."

This is supported by persuasive authority. *Whitman v. Fisher*, 98 Me. 575, 578, 57 Atl. 895; *Township of Crescent v. Anderson*, 114 Pa. 643-647, 8 Atl. 379, 60 Am. Rep. 367; *Dean v. Penn. Ry. Co.*, 129 Pa. 514, 525, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Illinois Cent. Ry. Co. v. McLeod*, 78 Miss. 334, 341, 29 South. 76, 52 L. R. A. 954, 84 Am. St. Rep. 630; *Bresee v. Traction Company*, 149 Cal. 131, 85 Pac. 152, 154, 5 L. R. A. (N. S.) 1059; *Hoag v. N. Y. Cent. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. 648; *M., K. & T. Ry. v. Bussey*, 66 Kan. 735, 745, 71 Pac. 261; *U. P. Ry. Co. v. Adams*, 33 Kan. 427-430, 6 Pac. 529; *Bressler v. C., R. I. & P. Ry. Co.*, 74 Kan. 256, 86 Pac. 472. If the law were otherwise, A. and B., having occasion to drive through the country on a matter of mutual business or pleasure, riding in a conveyance owned by A., who should drive, their course of travel leading across a railroad track, the situation of the intersection being very dangerous on account of it being "a blind crossing," with which A., the driver, was not familiar, but B. having full knowledge of such danger, he could sit in his seat and suffer A., without a word of warning or suggestion, to drive into the death trap, and if injured himself, when charged with contributory negligence, say, as A. was not his servant or agent he was not responsible for A. driving heedlessly onto the track. The law of common sense applied to such a situation is that the movement and control of the vehicle is as much under the direction and control of one as of the other.

Under the facts of this record the Circuit Court should stand justified in directing a verdict for the defendant. The judgment is affirmed.

KUJAWA v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, May 8, 1908.)

[116 N. W. Rep. 249.]

Railroads—Operation—Statutory Regulations—Crossing Highways—Signals.*—Under St. 1898, § 1809, providing that upon crossing any highway, except in cities and villages, the whistle shall be blown 80 rods from such crossing, and the engine bell rung continuously from thence until the highway is crossed by the locomotive, where the engine started from a point within the 80-rod limit, though the requirement that the whistle be blown at that distance from the crossing could not be fulfilled, it was still necessary that the bell be rung from the starting point until the crossing was passed, and, even in the absence of statute, a train should approach the crossing with due care with regard to the physical surroundings and obstructions to vision, and if it was necessary to give signals to warn travelers the failure to do so was negligence.

Same—Accidents at Crossings—Actions—Evidence—Negligence.—In an action for injuries resulting from a collision with plaintiff's buggy at a crossing where no signals were given, either by whistle or bell, as required by statute, of the approach of an engine to a highway crossing, and the view of the track was partially or wholly obstructed by trees and bushes so that a traveler coming from the other direction could not see an approaching train until he was within 140 feet of the crossing, a jury finding of negligence by the company in failing to give proper signals was warranted.

Same—Proximate Cause.†—In order to recover for injuries resulting from a collision at a highway crossing, alleged to have been caused by defendant's failure to give proper signals on approaching the crossing, its failure to do so must have been the proximate cause of the injuries.

Same—Duty to Stop—Question for Jury.—While there may be cases where it is the duty of the driver of a team, as a matter of law, to stop, and look and listen before approaching so near a railroad crossing that his horses would be frightened by an approaching train, as where it is impossible, by reason of obstructions to vision or noise, to see or hear its approach, and while it is his imperative duty to always

*For the authorities in this series on the question whether statutory requirements are the sole measure of a railroad's duties with respect to giving crossing signals, see foot-notes appended to *Southern Ry. Co. v. Winchester's Ex'x* (Ky.), 26 R. R. R. 736, 49 Am. & Eng. R. Cas., N. S., 736; *Hartman v. Chicago G. W. Ry. Co.* (Iowa), 26 R. R. R. 791, 49 Am. & Eng. R. Cas., N. S., 791; foot-notes appended to *Bickel v. Pennsylvania R. Co.* (Pa.), 25 R. R. R. 35, 48 Am. & Eng. R. Cas., N. S., 35.

†See first foot-note appended to *Rogers v. Rio Grande Western Ry. Co.* (Utah), 27 R. R. R. 567, 50 Am. & Eng. R. Cas., N. S., 567.

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look and listen, ordinarily he is not bound to stop upon approaching a crossing; the question of whether he should stop being usually one for the jury upon consideration of all the circumstances.

Same.—In an action for injuries received by a collision at a railroad crossing, where obstructions to the vision ceased at a point about 140 feet from the crossing and the road on which plaintiff was approaching was sandy, and his buggy was light, and made but little noise, and there were no other noises, so that he could have heard the engine bell had it been rung, whether the exercise of ordinary care required plaintiff to stop before approaching the crossing was for the jury.

Same—Proximate Cause of Injury.‡—Where a switch engine approached a railroad crossing without giving the statutory signal, and a traveler approaching in a buggy looked and listened for the signals, but did not, and under the circumstances was not required to, stop before crossing, and by reason of the failure to give signals he was led to approach nearer than he otherwise would have done, and to a point where the sight and noise of the approaching train caused his horses to become uncontrollable, so that he collided with the train, the failure to give proper signals was the proximate cause of the collision and resulting injury.

Appeal from Circuit Court, Marinette County; Samuel D. Hastings, Judge.

Action by Mike Kujawa against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for defendant upon a directed verdict, plaintiff appeals. Reversed and remanded for a new trial.

This is an action to recover damages resulting from a crossing collision at the unincorporated village of Crivitz. The main line of the Superior division of the defendant's railway runs north and south along the east side of the village. The Menominee branch of defendant's railway joins the main line at Crivitz; as this branch approaches the main line from the east it divides into a wye at a point several hundred feet distant from the main line, one line running northwest and the other southwest until each connects with the main line. The railway station and hotel are situated in the extreme southerly angle of the triangle thus formed. A highway running east from the village crosses the main track and several parallel side-

‡For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see first foot-note appended to *Pittman v. Chicago & E. I. R. Co.* (Ill.), 27 R. R. R. 435, 50 Am. & Eng. R. Cas., N. S., 435; foot-notes appended to *New York, etc., R. Co. v. Hamlin* (Ind.), 27 R. R. R. 370, 50 Am. & Eng. R. Cas., N. S., 370; first foot-note appended to *Smith v. Connecticut Ry., etc., Co.* (Conn.), 27 R. R. R. 201, 50 Am. & Eng. R. Cas., N. S., 201; foot-notes appended to *Hardt v. Chicago, etc., Ry. Co.* (Wis.), 26 R. R. R. 468, 49 Am. & Eng. R. Cas., N. S., 468.

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tracks at a point in the northerly part of the triangle about 850 feet north of the station platform. This highway continues to run easterly and crosses the northern branch of the wye at a point about 300 feet east of the track of the main line. To the south of this highway and in the triangle there is considerable growing brush and some jack pine and other trees, so that if a traveler crosses the main track and proceeds east on the said highway his view to the south and southeast, including that part of the north branch of the wye which is south of the highway, is much obscured until he reaches a point about 140 feet from and east of the crossing over the wye track after which point the vision is practically unobstructed.

It appears that at about 5 o'clock p. m. on June 29, 1906, the plaintiff's son Peter, about 16 years of age, started from Crivitz to go to his home in the country east of the village; that he was driving his father's double team hitched to a buggy and that his mother was with him in the buggy, and that the team was of ordinary gentleness. Peter testified that he started out on the highway in question; that as he approached the first track and about 200 feet therefrom he stopped and listened for a train but heard none, and then drove slowly on over the main track and side tracks, after which he drove on a slow trot towards the wye track; that he was listening for a whistle or a bell but heard none, and when he got past the bushes and trees he saw an engine rapidly approaching the crossing from the southeast on the wye track pushing a freight, caboose, and a flat car in front of it, about 250 feet from the crossing; that his horses saw the engine at the same time and became frightened and began to jump and run; that he tried to hold them, but could not, nor could he turn them off from the road; that they ran toward the crossing where they were struck by the flat car and killed, and he and his mother were thrown out; and that he would have stopped as soon as he had crossed the main track if he had heard the whistle or the bell. The fact of the collision was not disputed. The engine with the cars in question had come from the main track up the southern branch of the wye up to and just upon the Menominee main line, stopped and then proceeded on the north branch to the point of collision. No whistle had been blown, but it was claimed that the engine bell was rung continuously from the time the engine started on the north branch. The engine was run by the fireman alone who was sitting in the engine cab on the northeast side. A brakeman threw the switch which let the train in upon the north branch of the wye, the engine then stopped, the switchman closed the switch, got upon the caboose, and gave the fireman a signal to go ahead. The fireman then started ahead. The brakeman walked through the caboose out onto the flat car, which was loaded with iron sewer pipe, and first saw the team when they were about 20 or 25 feet from the

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crossing, and then gave a signal to the fireman to stop the engine, but it was too late to stop before reaching the crossing, and the train was not stopped until it had passed the crossing nearly 100 feet. The distance from the point of the wye to the crossing was 850 feet. The estimate of the speed of the train ranged from 6 or 8 miles, on the part of the defendant, to 12 or 15 miles, on the part of the plaintiff. There was testimony tending to contradict Peter's claim that the horses were running and beyond control, as well as testimony tending to corroborate his claim. There were two or three bridge carpenters riding on the flat car who saw the impending collision, and waved their arms and shouted to Peter, but gave no signal to the fireman. There was some testimony that immediately after the collision Peter said that he stopped by the bushes and one of his horses got scared and started to run and his lines broke, but this was denied by Peter.

At the close of the evidence a verdict for the defendant was directed, and, from judgment upon the verdict, the plaintiff appeals.

L. M. Evert (*P. H. Martin*, of counsel), for appellant.

C. E. Vroman and *P. A. Martineau* (*C. H. Van Alstine* and *H. J. Killilea*, of counsel), for respondent.

WINSLOW, C. J. (after stating the facts as above). The highway crossing in question was not within a city or incorporated village, hence it was within the terms of that part of section 1809, St. 1898, which requires that the engine whistle shall be blown 80 rods from the crossing, and the bell continuously rung from that point until the highway be crossed. As the engine in the present case started from a point well within the 80-rod limit the requirement that the whistle be blown 80 rods from the crossing became impossible of fulfillment, but the requirement that the engine bell be rung, at least from the point of starting until the highway was crossed, was still applicable, and entirely possible of fulfillment. Furthermore, even in the absence of express statutory requirement, it was the duty of the defendant to approach the crossing with due care having regard to the physical surroundings and the obstructions to vision, if any, and if the circumstances called for the giving of signals in order to properly conserve the safety of travelers who were approaching the crossing in the exercise of ordinary care the omission of the defendant to give such signals would be negligence. *Eilert v. G. B. & M. R. R. Co.*, 48 Wis. 606, 4 N. W. 769.

There was sufficient evidence from which the jury would have been justified in finding that no signal of any kind was given by the defendant's employees at any time during the approach of the engine from the time it started from the main track of the Menominee branch until it reached the crossing; there was also

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ample proof that the view of the track was partially or wholly obscured by bushes and trees so that a traveler on the highway coming from the east could not well see an approaching engine or train until he reached a point 140 feet from the crossing and perhaps nearer. So it must be held that there was sufficient proof to sustain a finding that defendant's employees were negligent in failing to give signals as the train approached the crossing, and the serious question in the case is whether the evidence would warrant a finding that such negligence, if found, was the proximate cause of the collision. Of course, there must be proximate causal relation between the negligence and the collision in order that the plaintiff may recover. The trial judge held that this causal relation could not be found, the reason being that it was the duty of the driver of the team to stop and look and listen before he got so near the crossing that he would be struck or that his horses would be frightened by the sight of an approaching engine; in other words, that the driver must determine where the danger zone, within which his horses are in danger of being frightened, begins, and must at his peril stop before entering upon that zone, and that if he does not do so, but proceeds without such precautions, and suffers injury by the frightening of his horses by a negligently operated train, he is necessarily guilty of negligence which is the proximate cause of his injury and is remediless. We think this rule is entirely too strict and imposes too onerous a burden on the traveler. While this court has consistently held that it is the imperative duty of every traveler approaching a railway track to look and listen for a train, it has not held that it is always his duty as matter of law to stop even though he be driving a team. Generally the question whether he should stop or not will be a question for the jury after due consideration of all the surrounding circumstances. *Duffy v. C. & N. W. Ry. Co.*, 32 Wis. 269; *Eilert v. G. B. & M. Ry. Co.*, 48 Wis. 606, 4 N. W. 769; *Seefeld v. C., M. & St. P. Ry. Co.*, 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168; *Abbott v. Dwinnell*, 74 Wis. 514, 524, 43 N. W. 496; *Duame v. C. & N. W. Ry. Co.*, 72 Wis. 523, 40 N. W. 394, 7 Am. St. Rep. 879.

True, there may be cases where the view of the approaching traveler is so thoroughly obstructed and his hearing so cut off by the noise of his wagon or by other causes that it is evident that neither sight nor hearing will afford him any protection, and in such cases if there be no conflict in the evidence the court will be justified in holding as matter of law that he should stop and make investigation, especially if he knows that a train is due. *Seefeld v. C., M. & St. P. Ry. Co.*, *supra*. Such cases, however, are exceptional, and we do not regard this as one of them. The evidence shows that the obstructions to the vision ceased at a point about 140 feet from the crossing; that the road was a

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sandy road, and that the buggy was a spring buggy and made very little noise. There was no evidence of other noises, nor that any wind was blowing, and the driver testified that he could have heard the engine bell had it been ringing. Under the circumstances we think that the question whether ordinary care required him to stop his team was one for the jury.

The statutory requirement that the engine bell be rung before reaching and while passing over the crossing is not designed merely to prevent travelers who are about to use the crossing from running into the train, but also to enable them to know of the approach of the train at a sufficient distance to guard their horses against taking fright. 2 Thompson, Com. on Negligence, § 1926; Norton v. Eastern Railway Co., 113 Mass. 366. This court in Ransom v. C., St. P., M. & O. Ry. Co., 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718, held that one who was traveling upon a highway parallel with the railroad track and near a crossing was also entitled to the benefits of the statute though not intending to use the crossing, and might recover for damages sustained by reason of the frightening of his horse because of the unexpected appearance of the train when no crossing signal had been given. Whether this case can now be construed as authority for the extreme view that a traveler on a parallel highway not expecting to use the crossing is entitled to rely on the statute requiring crossing signals is rendered more than doubtful by the partial disapproval of that case in Walters v. C., M. & St. P. Ry. Co., 104 Wis. 251, 80 N. W. 451, and this latter case seems to have been the case relied on by the trial judge in directing a verdict. As matter of fact however the Walters Case was not a case where a train approached a crossing intending to pass over it and failed to give the statutory signals. The plaintiff was approaching a city crossing from the east driving his team and was sitting on the hounds of his wagon. A switch engine and car was operating on the tracks somewhere north of the crossing. Before reaching the track he could see to the north a distance of 170 feet, but he did not look. Just as he was crossing the switch engine and car approached from the north, but stopped, as it was intended it should, at a switch just before reaching the crossing. A flagman at the crossing did not give the plaintiff notice of the approach of the switch engine. The plaintiff's team became frightened at the noise made by the engine and car and ran away, and he was injured by being thrown from the wagon as the team turned a corner block east of the crossing. This court reversed a judgment in plaintiff's favor on two grounds: First, because he was guilty of contributory negligence in not looking to the north; and, second, because there was no duty on the part of the railway employees to notify a traveler that a switch engine which was not to cross the street was merely operating in the vicinity. So far as the latter propo-

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sition was in conflict with the Ransom Case, that case was overruled, but no farther.

We do not see how the Walters Case controls the present case. Here, a switch engine was approaching and about to pass over a highway crossing without signal in violation of the statute. A traveler was approaching the crossing and listening for the signal. The circumstances were not such as to make it negligence as matter of law for him to approach without stopping. The evidence tended to show that by reason of the failure to give the statutory signal he was led to approach to a point nearer than he otherwise would have done, and to a point where the sight and noise of the coming train frightened his horses, causing them to become uncontrollable so that they dashed against the train. If these facts should be found by the jury, the chain of proximate causation would be complete.

Judgment reversed, and action remanded for a new trial.

MULLANE v. ST. PAUL CITY RY. CO. McDONALD v. SAME.

(Supreme Court of Minnesota, May 1, 1908.)

[116 N. W. Rep. 354.]

Street Railroads—Collision—Contributory Negligence.*—The fact that the plaintiff had been, immediately before being run into by a street car, driving his team faster than a walk, in violation of a city ordinance, is not conclusive evidence of negligence, which will prevent the recovery of damages in an action against the street railway company, unless it also appears that such negligence contributed towards the causing of the accident.

Appeal—Harmless Error.—An instruction stated to be applicable only in the event that the jury found that the plaintiff was guilty of contributory negligence, although erroneous in substance, is not

*For the authorities in this series on the subject of negligence or contributory negligence in violating an ordinance, see first foot-note appended to *Pittsburgh, etc., Ry. Co. v. Lightheiser* (Ind.), 18 R. R. R. 176, 41 Am. & Eng. R. Cas., N. S., 176; *Latson v. St. Louis Transit Co.* (Mo.), 19 R. R. R. 845, 42 Am. & Eng. R. Cas., N. S., 845 (violation of ordinances regulating the running of street cars); fourth foot-note appended to *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 26 R. R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520; *Seaboard A. L. Ry. v. Smith* (Fla.), 25 R. R. R. 793, 48 Am. & Eng. R. Cas., N. S., 793; fifth foot-note appended to *MacFea v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56 (speed in violation of ordinance); foot-note appended to *Chicago & E. R. Co. v. Lawrence* (Ind.), 27 R. R. R. 652, 50 Am. & Eng. R. Cas., N. S., 652 (assumption of risks by railroad employee from the violation by his company of ordinances or statutes).

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prejudicial; the jury having found, in answer to a special interrogatory, that the plaintiff was not guilty of contributory negligence.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Actions by Michael Mullane and by John McDonald against the St. Paul City Railway Company. Verdicts for plaintiffs. From an order denying motions for judgments notwithstanding the verdict or for a new trial, defendant appeals. Affirmed.

The respondent McDonald brought his action against the appellant to recover damages alleged to have been occasioned by the negligence of the appellant in the handling of one of its street cars. The respondent Mullane also brought an action against the street railway company to recover damages which he claims to have suffered through the killing of the horse which was being driven by the respondent at the time of the accident. The two cases were tried together, and verdicts returned in favor of McDonald for \$1,200 and Mullane for \$200. The defendant moved for judgment notwithstanding the verdicts or for a new trial, and appeals from an order denying the alternative motion. The cases were submitted in this court as one case, and the decision herein disposes of both cases. The facts and issues very clearly appear in the following memorandum filed by the learned trial judge:

"Plaintiff was injured while crossing the Robert Street Bridge, in St. Paul, by collision with a street car of defendant. Plaintiff was driving a team from the southerly to the northerly side of the bridge. There was a car in front of him on the right-hand track going in the same direction, but going so slowly that he wished to pass it. The bridge was so narrow that he could not safely pass to the right of the car, so he passed to the left, traveling partially on the track designed for south-bound cars. The bridge is highest in the center, and from the center span, which for a space is about level, it slopes towards either end, so that an approaching car cannot be seen for the full length of the bridge. There was some testimony that plaintiff proceeded to about the front vestibule of the north-bound car, when he saw a south-bound car approaching; that he then pulled in his team and attempted to pass to the rear of the north-bound car, but before he could do so the south-bound car struck his team, causing the injuries complained of. As one witness described it: 'He turned out to pass this car, and, when he did, why he went along before we could see the car coming over the top of the bridge, and when he did it was too late. The car was coming the other way so fast that he could not get time to turn back and out of the way from the car.' I believe the case was properly submitted to the jury. Plaintiff was upon a public thoroughfare,

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and he was lawfully and properly where he was at the time of the collision, unless he was guilty of contributory negligence. The jury found specifically that he was not guilty of contributory negligence. In my judgment there is evidence amply sufficient to sustain such a finding. It cannot be said, as a matter of law, that it is contributory negligence to attempt to pass a slowly moving street car, even though it is necessary, in order to do so, to travel upon tracks upon which cars approach going in the opposite direction. Whether such an act is negligence depends upon the circumstances of the case. Under the evidence in this case this question was clearly one for the jury."

N. M. Thygeson and W. H. Bennett, for appellant.

C. D. & R. D. O'Brien (E. W. Williams, of counsel), for respondent.

ELLIOTT, J. (after stating the facts as above). The jury found, in answer to a special interrogatory, that McDonald was not guilty of contributory negligence, and this finding is under the evidence final, unless the violation by McDonald of an ordinance of the city of St. Paul forbidding the driving of a team faster than a walk over any bridge in the city of St. Paul was negligence *per se* and contributed to the accident. This ordinance was passed in 1884, and it is at least doubtful whether it is reasonable, when applied to a bridge such as that upon which this accident occurred. However that may be, and assuming that McDonald was violating the ordinance when he drove around the car in the attempt to pass it, we have only the fact established that he was negligent in that particular respect. This alone would not prevent recovery, as it must further appear that the particular act of negligence contributed to the causing of the accident. It appears that his team had stopped and was standing still when it was struck by the approaching car. It was, under the circumstances, a fair question for the jury, assuming that he had been guilty of a negligent act, whether it contributed to causing his injury; and that question the jury answered adversely to the claim of the appellant. No instructions were asked or given with reference to the effect of the violation of the ordinance. The questions of negligence and contributory negligence were submitted to the jury with the ordinary instructions, and the evidence sustains the jury's conclusion.

As the plaintiff was not negligent, the question of the willful negligence of the defendant passed out of the case. The instruction with reference to willful negligence was based on the assumption that the jury should first find that the plaintiff was guilty of contributory negligence; and, it having been determined that he was free from fault, the instruction was no longer applicable, and any error contained therein was innocuous.

The appeal, then, rests upon the simple question whether there

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was any evidence reasonably tending to show that the motorman of the approaching car failed to exercise reasonable care in keeping a lookout, and, if so, whether such failure was the cause of the accident. The defendant offered no evidence upon this issue, and, the verdict having been approved by the trial court, the plaintiff is entitled to have his evidence considered in the most favorable light.

The undisputed evidence made an issue for the jury, and the orders of the trial court are therefore affirmed.

GORTON v. HARMON.

(Supreme Court of Michigan, May 1, 1908.)

[116 N. W. Rep. 443.]

Railroads—Operation of Trains—Negligence.*—It was negligence for a railroad company to operate a passenger train at night through the country and across highways at the rate of 30 miles an hour without a headlight, and with only a red lantern hung on the tender of the engine, which was being run backwards.

Same—Accidents at Crossings—Contributory Negligence—Duty of Traveler to Stop.†—A traveler by daylight is not required to stop before crossing a railroad track, where the condition of the crossing is such that he can see the approach of a train for several hundred feet, and in ample time to stop before the train can reach the crossing.

Same—Actions—Question for Jury—Contributory Negligence.—In an action for loss of services of plaintiff's wife, who was killed in a railroad crossing accident at night, evidence held to require submission of the issue of contributory negligence to the jury.

Negligence—Actions—Pleading—Gross Negligence—Ordinary Negligence—Verdict.—A complaint alleging a case of gross and wanton negligence will support a verdict for ordinary negligence.

*See generally, *Bowles v. Chesapeake & O. R. Co.* (W. Va.), 25 R. R. R. 309, 48 Am. & Eng. R. Cas., N. S., 309.

For the authorities in this series on the question whether any rate of train-speed at crossings in the country may be negligent, see foot-note appended to *Hoffard v. Illinois Cent. Ry. Co.*, 23 R. R. R. 236, 46 Am. & Eng. R. Cas., N. S., 236; *Phillips v. Washington & R. Ry. Co.* (Md.), 26 R. R. R. 93, 49 Am. & Eng. R. Cas., N. S., 93.

†See first foot-note appended to *Chesapeake & O. Ry. Co. v. Wilson's Adm'r* (Ky.), 27 R. R. R. 238, 50 Am. & Eng. R. Cas., N. S., 238; foot-note appended to *Louisville & N. R. Co. v. Taylor's Adm'r* (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228; *Southern Ry. Co. v. Winchester's Ex'x* (Ky.), 26 R. R. R. 736, 49 Am. & Eng. R. Cas., N. S., 736; foot-notes appended to *Seaboard A. L. Ry. v. Smith* (Fla.), 25 R. R. R. 793, 48 Am. & Eng. R. Cas., N. S., 793; foot-notes appended to *Mankewicz v. Lehigh Valley R. Co.* (Pa.), 25 R. R. R. 509, 48 Am. & Eng. R. Cas., N. S., 509; *Choctaw, etc., R. Co. v. Baskins* (Ark.), 25 R. R. R. 431, 48 Am. & Eng. R. Cas., N. S., 431; first foot-note appended to *Osteen v. Southern Ry.* (S. Car.), 25 R. R. R. 300, 48 Am. & Eng. R. Cas., N. S., 300.

Gorton v. Harmon

Death—Actions for Causing Death—Injuries to Wife—Loss of Services—Damages.†—In an action for the death of plaintiff's wife, the measure of damages was the value of the services lost by her death, less the cost of her maintenance.

Error to Circuit Court, Genesee County; Charles H. Wisner, Judge.

Action by George T. Gorton, as administrator of the estate of Mattie Gorton, deceased, against Judson Harmon, as receiver of the Pere Marquette Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed. New trial ordered.

Defendant's railroad runs northeasterly and southwesterly. A highway known as "Atherton Road," running east and west, crosses the railroad at an angle of 35 degrees. Plaintiff and his wife and a Mr. Allen and his wife, on the night of January 5th, at about 10 o'clock, drove with a team of horses and a surrey from the east to the west over the Atherton Road. While crossing the railroad track the hind wheels of the surrey were struck by the tender of an engine attached to a passenger train and both women were killed. Plaintiff brought this suit to recover damages for the loss of the services of his wife. The train, a passenger train, left Detroit at 5:30. When near Milford, about 30 miles from the place of the accident, the engine was disabled. A south-bound freight train was near the place of the accident. The defendant ordered the engine of the freight train to take the passenger train through to Flint. There was no turntable or Y near the place of the accident, so the engine was coupled to the passenger train, with its headlight towards the coaches. A red lantern was hung on the back end of the tender. There was nothing but the red lantern, except the whistle when blown, the bell when rung, and the light from the passenger coaches to indicate the presence of a train. The engineer's vision was obscured by flurries of snow and flying coal dust from the tender. The train was running 30 miles an hour, with an automatic bell ringing. A strong wind was blowing from the northwest. The ladies were sitting upon the back seat; plaintiff was driving, and sat upon the right side of the front seat. They had driven from the north on the north and south road which crossed Atherton Road 80 rods from the railroad crossing. The ground was frozen and the horses were shod. After turning west upon the Atherton Road they drove at a slow trot or "shack" until they were struck. Both Mr. Gorton and Mr. Allen testified that, as they approached the track, with which both were familiar, they

†For the authorities in this series on the subject of the elements of damages recoverable by husband or wife for the death of or injuries to the other, see foot-notes appended to *Philby v. Northern Pac. Ry. Co.* (Wash.), 26 R. R. R. 485, 49 Am. & Eng. R. Cas., N. S., 485; *Sappington v. Atlanta & W. R. R. Co.* (Ga.), 22 R. R. R. 846, 45 Am. & Eng. R. Cas., N. S., 846.

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looked for a train. One of them saw some red lights, but saw nothing to indicate that they were on an approaching train. Mr. Allen testified that he thought once he heard a whistle, and he looked for a train. They did not see the train until just as the horses were about to step upon the track. Allen saw it first, Gorton an instant later. Allen testified that Gorton "went to try to stop, but couldn't." Mr. Gorton testified that "When I saw it was a train I knew I could not stop, but I thought there was plenty of time to get across." The train consisted of four coaches, all lighted. The engineer did not see the vehicle nor feel the engine strike it. He saw the team running west down the highway. Plaintiff's intestate, 35 years old, left surviving her her husband, a son, and daughter, aged, respectively, 37, 15, and 13 years old. Plaintiff recovered verdict and judgment for \$4,800.

Argued before GRANT, C. J., and BLAIR, MONTGOMERY, MOORE, and OSTRANDER, JJ.

Stevens, McPherson & Bills (Carton & Bray, of counsel), for appellant.

Black & Roberts (De Vere Hall, of counsel), for appellee.

GRANT, C. J. (after stating the facts as above). 1. Counsel for the defendant do not deny that it was negligence in the defendant to run its train through the country and across highways at the rate of 30 miles an hour without any headlight. Whether such an act is gross negligence we need not determine. We may rightfully say it was negligence without excuse. The sole defense upon this branch of the case is that the defendant and Mr. Allen were guilty of contributory negligence. Their negligence is alleged to consist in that they did not stop when nearing the track and listen for a train. Had it been daylight there would clearly have been no obligation to stop, for they could have seen in ample time to stop their team. For hundreds of feet the train was in plain sight to the traveler by daylight. To run a train across the country and public highways without any headlight is a most unusual thing. It is a matter of common knowledge that trains almost universally have headlights which throw a powerful light ahead of the train, and that this light can be seen, where there are no obstructions, for a great distance. Travelers, in the absence of any other warning, have a right to assume that the engines of trains are provided with such lights. The red light on the end of the tender was no notice of the approaching train. If the travelers saw the red light it does not follow that they could see it move towards them, for it would seem nearly stationary as they looked at it. Red lights on the rear of trains are indication of danger to those in the rear. It has not been used upon the front of trains as a warning to travelers.

It is also suggested that these travelers could have seen the

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lights shining from the windows of the cars. There is evidence that the interior lights were shining from the passenger cars. Whether the cars were supplied with shades and whether some of them were down does not appear. It does appear, however, that the wind was blowing the dust from the coal in the tender and the smoke from the engine directly between the travelers and the cars behind the engine. It cannot therefore be said as a matter of law that these lighted cars could have been seen by the travelers. For the same reason, although the bell was ringing automatically, and although the whistle may have been blown at the proper place, it does not follow that the travelers should or would have heard it even if they had stopped, for the wind was carrying the sound from them.

It must be conceded that the charge of the court was very favorable to the defendant, unless it should have directed a verdict. We may, however, with propriety, give one excerpt from the charge, as follows: "I further instruct you that if, as the plaintiff approached the railway crossing, he could by stopping, looking, and listening, and at a safe distance, have discovered whether or not the train was in dangerous proximity, and by so doing could have averted the accident, it was his duty so to do, and failing to do so he cannot recover in this case, * * * unless you find from the evidence that the conduct of defendant was such as to induce him to believe that it was not necessary for him to stop and look and listen in order to ascertain whether a train was approaching the crossing in such proximity as to make it unsafe to cross the track." We think the question of contributory negligence belonged, and was properly submitted, to the jury.

2. It is urged that the declaration alleges a case of gross and wanton negligence, and, under the instruction of the court, the jury were allowed to find a verdict based on ordinary negligence. The greater includes the less. Under a charge of murder the defendant may be found guilty of crimes of lesser degree. It would certainly reflect upon the wisdom of the law that would permit parties to be found guilty of lesser crimes, though not specifically charged therewith, but would not permit recovery in a civil action where a greater degree of negligence is charged, but which includes the less. This point, however, is ruled against the defendant by *Keating v. Railroad Co.*, 104 Mich. 418, 62 N. W. 575; *Richter v. Harper*, 95 Mich. 225, 54 N. W. 768.

3. The court instructed the jury that the measure of damages was the value of the services lost to the plaintiff, and that they should not deduct the cost of her maintenance. It is the well-settled rule under this and similar statutes that compensation is limited to the pecuniary loss sustained. *Walker v. Lake Shore, etc., R. Co.*, 111 Mich. 518, 69 N. W. 1114, and authorities there cited. This question has not before been presented to this court.

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Counsel for the plaintiff cite *Bowdle v. Railway Co.*, 103 Mich. 272, 61 N. W. 529,* 50 Am. St. Rep. 366, and quote from the syllabus as follows: "And it is held that the plaintiff was properly limited in his recovery to the value of such services as the wife would have been likely to render in the discharge of her domestic duties." While the syllabus is a correct statement of the law, the question was not discussed in the majority opinion, and the language of the syllabus is quoted from the dissenting opinion.

Counsel for plaintiff cite several cases and text-book authorities holding that a husband is entitled to recover the reasonable value of the time and services lost to him, but none of them discusses the question now before us. It is as much the duty of the husband to provide suitable clothing and maintenance for his wife as it is for his son. He is entitled to the value of the services of both. It is the universal rule that in case of a son or daughter the cost of maintenance must be deducted from the value of his services. *Snider v. Lake Shore, etc., Ry. Co.*, 131 Mich. 418, 91 N. W. 643; *McDonald v. Champion Iron & Steel Co.*, 140 Mich. 401, 103 N. W. 829. There can be no distinction between the case of a son and that of a wife. The pecuniary loss in each case is the value of the services less the cost of maintenance. See *Gulf, etc., R. Co. v. Southwick* (Tex. Civ. App.) 30 S. W. 592; *Railway Co. v. Gunning*, 33 Colo. 280, 80 Pac. 727; 13 Cyc. 370. It follows that the instruction of the court in this regard was erroneous.

Other questions are raised, but, as they may not arise upon a new trial, we refrain from discussing them.

Judgment reversed, and new trial ordered.

*See 61 N. W. 529, for correct syllabus.

SOUTHERN RY. CO. *v.* DARWIN *et al.*

(Supreme Court of Alabama, May 14, 1908. Rehearing Denied July 3, 1908.)

[47 So. Rep. 314.]

Railroads—Fires—Contributory Negligence—Precautions against Fire.*—An owner of property adjacent to a railroad right of way may use it in any natural and lawful manner, without incurring the imputation of contributory negligence in case of a fire, and without taking on himself other risks than such as are incident to the operation of the railroad with proper care, and he is entitled to damages for injuries by fires arising from negligence in the construction or management of locomotives or the condition in which the track is suffered to remain; but he assumes the risk of loss by fire started without such negligence, which risk is increased by his permitting his premises to remain in a highly combustible state, or by locating his buildings in an exposed portion with reference to flying sparks.

Same.†—A railroad owes the duty to owners of property adjacent to its right of way to employ machinery of approved construction and to operate its engines with such precautions as are not inconsistent with the lawful, reasonable, and effective conduct of its business.

Same.*—One owning property adjacent to a railroad right of way is under no obligation to stand guard over it to protect it from the negligence of the railroad company, though he is charged with the duty of saving his property when he can do so.

Same.*—One having property adjacent to a railroad right of way is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, and he is not required to remove combustible matter therefrom to provide against the consequences of probable negligence of the company in communicating fire thereto.

Same.*—The only negligence of an owner of property adjacent to a railroad right of way, which precludes a recovery for loss by fire set by the railroad company, is the failure, after the fire has been set, to do that which prudence requires for the protection of his property, or the doing of some act inconsistent with the preservation thereof.

Same.*—In an action against a railroad company for the destruc-

*See foot-notes appended to *Smith v. Ogden & N. W. R. Co.* (Utah), 27 R. R. R. 487, 50 Am. & Eng. R. Cas., N. S., 487; foot-notes appended to *Walker v. Chicago, etc., Ry. Co.* (Kan.), 24 R. R. R. 774, 47 Am. & Eng. R. Cas., N. S., 774.

†As to the care required of a railroad company in furnishing spark arresters, see third foot-note appended to *Southern Ry. Co. v. Thompson* (Ga.), 27 R. R. R. 561, 50 Am. & Eng. R. Cas., N. S., 561; second foot-note appended to *Mills v. Louisville & N. R. Co.* (Ky.),

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tion of property by fire, a plea which alleges the proximity of the property to the right of way and the contributory negligence of the owner in not having a watchman at the property, though he knew of the proximity of the property to the right of way and the liability of fire from passing trains, and that the owner with such knowledge negligently piled cotton near the right of way, etc., is bad on demurrer, since it attempts to set up contributory negligence growing out of the owner's failure to guard the property prior to the negligent acts of the company.

Same—Evidence—Admissibility.—In an action against a railroad company for the destruction of property by fire set by an engine, the testimony of a witness that he saw a train throwing out large volumes of sparks was admissible to show that the engine did not have a good spark arrester, or that it was out of repair, when the jury could infer that the engine in question set the fire.

Same—Instructions.—An instruction, in an action against a railroad company for the destruction of property by fire, that uncertainty in the minds of the jury as to whether the fire was caused by reason of the engine being improperly made, or in bad condition, or badly handled, is no reason for failing to find a verdict for plaintiff, and that a verdict for plaintiff must be found if the fire was caused by either of such causes, and that, if plaintiff has shown that the fire was caused by the engine, plaintiff has nothing to do until the company has reasonably shown that the engine was properly built, and was not in a bad or defective condition, and that the throwing of sparks was not caused by careless management, etc., is not erroneous.

Same.—Where, in an action against a railroad company for the destruction of property by fire, the evidence justified an inference that the engine was improperly handled and did not have a modern spark arrester, notwithstanding the evidence of the company to the contrary, the court properly refused to charge that the evidence did not authorize a recovery on the ground of defects in the spark arrester, or because of the improper construction of the engine, etc.

McClellan, J., dissenting.

9 R. R. R. 409, 32 Am. & Eng. R. Cas., N. S., 409, where all those preceding it are collected or referred to.

For the authorities in this series on the subject of the degree of care required of a railroad in operating its locomotives to prevent the property of others from being set on fire, see *Southern Ry. Co. v. Thompson* (Ga.), 27 R. R. R. 561, 50 Am. & Eng. R. Cas., N. S., 561; *Gracy v. Atlantic Coast Line R. Co.* (Fla.), 26 R. R. R. 508, 49 Am. & Eng. R. Cas., N. S., 508; *Woodward v. Chicago, etc., Ry. Co.* (C. C. A.), 25 R. R. R. 673, 48 Am. & Eng. R. Cas., N. S., 673; *Louisville & N. R. Co. v. Fort* (Tenn.), 12 R. R. R. 276, 35 Am. & Eng. R. Cas., N. S., 276 (care required of railroad when there is unusual danger on account of drought and wind); *Alabama, etc., R. Co. v. Clark* (Ala.), 9 R. R. R. 589, 32 Am. & Eng. R. Cas., N. S., 589; *Abrams v. Seattle & M. Ry. Co.* (Wash.), 2 R. R. R. 465, 25 Am. & Eng. R. Cas., N. S., 465; note, 15 Am. & Eng. R. Cas., N. S., 508, et seq.

Southern Ry. Co. v. Darwin

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by J. W. Darwin and another against the Southern Railway Company for damages for the destruction of property by fire. From a judgment for plaintiffs, defendant appeals. Affirmed.

The cause was tried upon counts 3 and 4, which allege simple negligence and the destruction of the property therein described by means of fire negligently communicated from one of the locomotives being operated by defendant on its said railroad. The second special plea alleges the proximity of the gin house to the railroad and the contributory negligence of plaintiff in not having a watchman at the gin, since the plaintiff knew of the proximity of the gin and cotton to the railroad and the liability of fire from passing trains. Plea 3 alleges the proximity of the gin to the railroad, and that with this knowledge plaintiff piled cotton carelessly and negligently so near to the railroad and the gin, knowing of its exposed condition to fire and that it would communicate the fire to the gin, etc. Pleas 4 and 5 are an elaboration of pleas 2 and 3. A number of demurrers not necessary to be here set out were interposed to these pleas and sustained. The facts are sufficiently stated in the opinion.

At the request of the plaintiff the following charges were given for the plaintiff "(2) Uncertainty in your minds as to whether the fire was caused by reason of the engine being improperly made, or being in bad condition, or being badly handled in respect to the throwing of sparks, is no reason for failing to find a verdict for the plaintiffs; and it will be your duty to find your verdict for the plaintiffs if you believe from the evidence that the fire was caused by either one of those three causes. (3) I charge you that, if the plaintiffs have reasonably satisfied you from the evidence that the fire was caused by defendant's locomotive, then the plaintiffs have nothing to do until the defendant has reasonably satisfied you of each and all of the three following things: (1) That so far as regards the throwing of sparks the engine was properly built; (2) that in that respect said engine was not in a bad or defective condition; (3) that the throwing of sparks is not caused by unskillful or careless management of the locomotives. And even should the defendant in its turn reasonably satisfy you of all the three things above named, yet the plaintiffs may by their evidence overcome the evidence of defendant, and show you that the fire was set out from the engine, either because it was badly built, or in bad condition, or badly handled; and if, from all the evidence in the case, you believe that the fire was caused by the negligence of the railway, your verdict must be for the plaintiffs."

The following charges were refused to defendant: (1) The affirmative charge. (2) Affirmative charge as to fourth count.

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(3) Affirmative charge as to third count. “(4) The evidence in this case would not authorize a recovery on account of any improper construction of the engine going east, which stopped at Hollywood on the night of the fire. (5) There is no evidence in this case that would authorize a verdict for the plaintiffs upon the ground that the engine going east, which stopped at Hollywood on the night of the fire, was not carefully handled or managed when it passed the gin. (6) The evidence in this case would not authorize a recovery on account of any defect in the spark arrester on engine No. 284.”

There was a motion for a new trial, based upon the admission of testimony, the giving of the two above-quoted charges requested by plaintiff, and the refusal of the court to give the charges requested by defendant, which motion was overruled.

Humes & Speake, for appellant.

Bilbro & Moody, for appellees.

ANDERSON, J. “The preferable doctrine appears to be that the owner of premises near or contiguous to a railroad right of way is not bound to anticipate negligence on the part of the railroad, and, by way of prevention, to make provision against the communication of fire. Such proprietors in general owe no duty to railroad companies in this respect, and hence negligence, in its legal sense, can rarely be imputed to them. The rule in this connection, as most frequently expressed, is that the owner of property near or through which a railroad passes is entitled to use it in any natural and lawful manner, without incurring the imputation of contributory negligence in the occurrence of a fire; that he may use or permit his property to be used, or to be and remain in the same manner or condition as if no railroad passed within the range of communication of fire. Such proprietors may cultivate their lands, or build upon them, or leave them in a state of nature, as they see proper, and take upon themselves thereby no other risks than such as are incident to the operation of the road with proper care by the company, and will, therefore, be entitled to damages for injuries by fires arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain. Considered in another aspect, the preferable doctrine simply means this: The owner of adjacent property assumes the risk of loss from all fires started or communicated without the negligence of the railroad. If he permits his premises to be or remain in a highly combustible state, or locates his buildings in an exposed portion with reference to flying sparks, his risk is thereby increased. It may be argued in opposition to this view that such conduct on the part of adjacent proprietors would impose on the part of the railroad company an increased and onerous burden of care and prudence, since, as has been

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seen, what is due care on the part of the railroad is made to vary with the circumstances. But this is not so. In point of fact the most extreme degree of care to which railroad companies are ever held is fixed and reasonable. They are only required to employ machinery of approved construction, and to operate their engines with such precautions as are not inconsistent with the lawful, reasonable, and effective conduct of their business. Beyond this the abutting property owners take the risk." 13 Am. & Eng. Ency. Law (2d Ed.) pp. 482-484, and cases there cited; L. & N. R. R. Co. v. Marbury Lumber Co., 125 Ala. 262, 28 South. 438, 50 L. R. A. 620; L. & R. R. Co. v. Malone, 116 Ala. 600, 22 South. 897.

"A person has the right to construct buildings on any part of his property, and to enjoy the same, without rendering himself liable to the negligence of a railroad company, whereby they are destroyed by fire. It has been held, therefore, that one is not guilty of contributory negligence in building a house near a railroad track, so as to prevent a recovery, if burned through the negligence of the company, though he knew the danger of fire was thereby increased." 13 Am. & Eng. Ency. Law (2d Ed.) 487. Nor does the law require a party to stand guard over his property, as was held in the cases of Tien v. Louisville, etc., R. Co., 15 Ind. App. 304, 44 N. E. 45, and Jacksonville R. R. v. Peninsular Land Co., 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65, and which we approve. A person having property adjacent to a railroad is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, but every person has the right to enjoy his property in an ordinary manner; and while one is charged with the duty of saving his property when he can do so, he is under no obligation to stand guard over it, and continually watch it to protect it from the negligence of a railroad company. "A proprietor of contiguous property is not required to remove combustible matter from his own land in order to provide against the consequences of possible or even probable negligence on the part of a railroad company in communicating fire thereto." 13 Am. & Eng. Ency. Law (2d Ed.) 485, and cases cited in note 3. "On the other hand, it has been declared that the negligence of the plaintiff which precludes a recovery in an action for damages for destruction by fire is where, in the presence of a seen danger (as where the fire has been set), he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is not seen, but anticipated merely, or dependent on future events (such as the continuance of the defendant's negligence), the plaintiff is not bound to guard against it by refraining from his usual course, if otherwise consistent with the conduct of a prudent man in the management of his

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property and business." 13 Am. & Eng. Ency. Law (2d Ed.) 481. This last principle is the one realized and enunciated in the case of L. & N. R. R. v. Sullivan, 138 Ala. 379, 35 South. 327, the opinion in which proceeds upon the idea that the pleas set up negligence on the part of the plaintiff occurring subsequent to the negligence complained of on the part of the defendant, but does not hold that the condition of plaintiff's premises and his failure to guard same, prior and up to the negligent acts of the defendant, amounted to contributory negligence. The special pleas in the case at bar do not set up subsequent contributory negligence, but attempt merely to charge the plaintiffs with contributory negligence growing out of the condition of their premises and their failure to keep a watch over same prior and up to the negligence charged against the defendant, and the demurrers thereto were properly sustained.

It is true the special pleas in the case at bar bear a striking resemblance to pleas 2 and 3, which were held good in the case of L. & N. R. R. Co. v. Sullivan, *supra*. But a comparison of the pleas in said case with the only count they answer, the sixth, will show that they set up negligence on the part of the plaintiff subsequent to the negligence of the defendant, as set out in the said sixth count of the complaint, and not conditions existing prior to the negligence charged to the defendant. The negligence charged in the sixth count was placing by the defendant close to the plaintiff's property dry grass and weeds; and the negligence in the seventh count was placing cotton that had been saturated with oil near plaintiff's property. The pleas set up the negligence of plaintiff in not removing them, knowing of the danger, and which was an omission subsequent to the negligence charged to the defendant. An examination of the original brief of counsel for applicant in the Sullivan Case, *supra*, shows a concession that a plaintiff could not be held guilty of contributory negligence for failing to anticipate and guard against the future negligence of the defendant; the contention being that the pleas set up "subsequent negligence in failing to protect themselves against the result of the prior negligence of the defendant known to the plaintiff, and where he had the means of protecting himself from danger therefrom without unreasonable expense or trouble."

The trial court did not err in permitting the witness McCutchen to testify that he saw the train throwing out "large volumes of sparks." The jury could well infer that it was the engine in question. It was seen at Scottsboro shortly before it reached Darwin's gin, and was going in that direction; and the fact that it was throwing out large volumes of sparks tended to show that it did not have a good spark arrester or that it was out of repair.

The trial court did not commit reversible error in giving

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charges 2 and 3, requested by the plaintiffs. They are copies of charges given in the case of *A. G. S. R. R. v. Sanders*, 145 Ala. 449, 40 South. 402.

While the defendant proved that the engine was properly handled and had a modern and perfect spark arrester, there was contradictory evidence sufficient to justify contrary inferences for the jury. The jury examined the spark arrester and heard the testimony as to the size of sparks emitted from the engine, and which was sufficient to create an inference that it had no spark arrester, or, if it did, that it was out of repair, or else not properly adjusted. There was also evidence tending to contradict the engineer as to the handling of the engine. He testified that at the time he was opposite the gin it was a downgrade and the steam was shut off; while the plaintiff offered evidence that there was an upgrade at that point and the engine was puffing and emitting a large and unusual quantity of large sparks. The trial court did not err in refusing the requested charges of the defendant. *Clark Case*, 136 Ala. 450, 34 South. 917; *Sanders Case*, *supra*; *L. & N. R. R. Co. v. Marbury Lumber Co.*, *supra*.

The trial court did not err in overruling the motion for a new trial.

The judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and HARALSON, DOWDELL, SIMPSON, and DENSON, JJ., concur.

DEVLIN *et al.* v. CHARLESTON & W. C. Ry. Co.

(Supreme Court of South Carolina, April 1, 1908.)

[60 S. E. Rep. 1123.]

Railroads—Fires—Evidence.—Evidence, in an action against a railroad for cotton seed destroyed by fire from an engine, examined and a nonsuit held properly refused.

Same—Contracts for Exemption from Liability.—A seedhouse was erected on defendant railroad's right of way under a contract binding the person erecting the same to save defendant harmless from damage arising from the occupancy of such person, whether the damage was caused by defendant's negligence or otherwise. Plaintiff's stored seed in the seedhouse, which was destroyed by fire from an engine of defendant. Held, that the fact that plaintiffs knew of the contract did not affect their right to recover.

Appeal—Presentation and Reservation of Grounds of Review—Matters Not Presented—Variance.—If a variance was deemed material by defendant, he should, under Code Civ. Proc. 1902, § 190, have apprised the court in what respect it was misled to its prejudice, and it is too late to urge the variance for the first time on appeal.

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Same—Questions of Fact—Verdicts—Amount of Recovery.—The court will not disturb a verdict within the allegation and proof merely because it is claimed to be excessive.

Appeal from Common Pleas Circuit Court of Greenwood County; C. C. Featherstone, Special Judge.

Action by O. E. Devlin and others against the Charleston & Western Carolina Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

McGhee & Richardson and *S. J. Simpson*, for appellant.
Sheppards, Grier & Park, for respondents.

JONES, J. A lot of cotton seed belonging to plaintiffs and stored in the warehouse of their father, R. H. Devlin, located on defendant's right of way near the track, at Verdery, Greenwood county, was destroyed by fire on October 30, 1906, and this action was brought to recover damages therefor under allegations that the fire was the result of defendant's negligence. From a verdict and judgment in favor of plaintiffs for \$516.75, defendant appeals.

The first contention is that there was error in refusing the nonsuit made on the ground that there was no evidence of negligence. It was proper to refuse nonsuit. There was evidence tending to show that defendant, without necessity therefor, permitted its engine to remain stationary for about an hour immediately opposite the Scott warehouse adjoining the Devlin seed-house, in which was stored hay and other articles; that the bottom planks of said warehouse were off, that combustible material, such as paper and leaves, were allowed to be upon the right of way from track to warehouse; that while the engine was standing by said warehouse it emitted sparks of fire, and that burning clinkers or coals were thrown out upon the track; that about thirty minutes after the engine left it was discovered that the end of the Scott warehouse next the track was on fire, the fire apparently starting from the ground and going up the wall; and that said fire was communicated to the Devlin seed-house and destroyed plaintiff's cotton seed. There was no evidence that the fire originated in any other way than from defendant's engine, and there was testimony tending to show that coals of fire, apparently thrown out of the engine, were burning on the track when the end of the Scott warehouse was discovered to be on fire, and that there was appearance that material had been burned between the track and warehouse. This testimony afforded some evidence that the fire was the result of defendant's negligent use of its engine under the circumstances.

Appellant's next contention is that the court erred in excluding from evidence a written contract between the defendant com-

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pany and R. H. Devlin, the father of plaintiffs, and owner of the seedhouse in which plaintiffs' cotton seed was stored. One of the plaintiffs signed for R. H. Devlin, and both signed as witnesses to the contract. Under this contract, dated February 20, 1904, R. H. Devlin acquired the right to erect the seedhouse on defendant's right of way in which R. H. Devlin engaged, among other things, "to save the defendant harmless from all damage to any person that may partly or wholly arise from or be traceable to the occupancy of said premises by the party of the first part or any other person, whether such damage be caused by the negligence of the company's employees, or from any other cause whatsoever." Appellant contends that this contract was admissible on the ground that, if plaintiffs stored their property in that house with knowledge of said agreement, that fact would tend to show estoppel and contributory negligence. It was not error to exclude the instrument, as it did not appear that plaintiffs were parties thereto, or were bound thereby, as lessees or assignees, so as to place them in privity with R. H. Devlin. The allegation of the complaint and the proof was to the effect that the seedhouse belonged to R. H. Devlin, and plaintiffs had stored therein the cotton seed. Conceding that plaintiffs had knowledge of the terms of the contract, they could only know that R. H. Devlin had agreed to insure the building and contents and indemnify the defendant against loss occurring as in this case, a matter not affecting their right to recover of defendant for any loss they might sustain through defendant's negligence. This point was expressly so ruled in *King v. Southern Pacific Co.*, 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755.

The last alleged ground of error is that there was no evidence to support the amount of the verdict. There was evidence that plaintiffs lost by the fire 40 tons of cotton seed worth probably \$16.15 per ton, amounting to \$646, and the jury rendered a verdict for \$516.75. The contention, however, is that the complaint alleged loss to the amount of \$750 from destruction of cotton seed "stored in a seedhouse," etc., and that the proof was that the seed was in two seedhouses adjacent, and that two-thirds of the seed was in one house and one-third in the other, and that in no event should the recovery exceed two-thirds of \$646 (\$436.66), or two-thirds of \$750, the amount claimed (\$493.33).

There is nothing to show that defendant was misled to his prejudice. Very probably both storing rooms were under a single roof, or one was a shedroom attached to the other. At any rate, both rooms or houses were the property of R. H. Devlin closely adjacent. If the variance between the proof and allegation was deemed material, defendant, under section 190 of the Code of Civil Procedure of 1902, should have apprised the court in what respect it was misled thereby to its prejudice, whereupon the court could have ordered an amendment upon just terms. It is

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too late now to urge such objection. The exception must be overruled under the well-established rule that this court will not disturb a verdict within the allegation and proof merely because it is claimed to be excessive.

The judgment of the circuit court is affirmed.

ADAM v. UNION ELECTRIC CO.
(Supreme Court of Iowa, May 14, 1908.)

[116 N. W. Rep. 332.]

Street Railroads—Injuries to Persons on Tracks—Mutual Rights of Driver and Railway Company.*—On observing a street car, the driver of a vehicle can neither recklessly drive on the crossing in a race with the car, nor is he arbitrarily required to stop and await its passage.

Same—Contributory Negligence—Driver of Vehicle.—Where the driver of a vehicle observes a street car at such distance that in the exercise of ordinary prudence he believes he can safely cross, and in undertaking to do so a collision occurs, such collision cannot be attributed to negligence on his part.

Same—Actions for Injuries—Questions for Jury.*—Where the driver of a vehicle on approaching a street railway track observed a car coming, but did not know of its excessive speed, and then looked in the opposite direction, and on turning his head back the car had moved so rapidly that it was but 20 or 30 feet away, and the front wheels of his vehicle were then on the track, it cannot be said as a matter of law that a prudent man would have backed up or gone ahead, and it was for the jury whether in what he did there was any want of ordinary care.

Same—Contributory Negligence.*—Where with his horse walking at an ordinary gait and a street car moving at a speed such as the jury might have found reasonable, though up to the limit short of excessive, the driver might have passed in safety, the issue whether in undertaking to cross the driver was guilty of contributory negligence was rightfully left to the jury.

Appeal from District Court, Dubuque County; M. C. Mathews, Judge.

Action for damages resulted in judgment against defendant. from which it appeals. Affirmed.

Hurd, Lenchan & Kiesel and *Matthews & Frantzcn*, for appellant.

T. J. Fitzpatrick and *Longueville & Kintzinger*, for appellee.

*See first foot-note appended to *Wolf v. City Ry. Co. (Ore.)*, 27 R. R. R. 213, 50 Am. & Eng. R. Cas., N. S., 213, where all the preceding authorities in this series on the subject are collected.

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LADD, C. J. The plaintiff in coming south on Jackson street in Dubuque undertook to drive his horse and buggy across the defendant's street car line extending east and west in East Point avenue, and was struck by a car coming from the east. Appellant insists that he should not have been allowed damages for that, as it is contended, he contributed to his injury by his own negligence. The refusal to direct a verdict for defendant on this ground is the only error assigned. In determining this question the evidence most favorable to plaintiff must be accepted. According to the evidence in his behalf he had taken his father to his home on Jackson street about 130 feet north of the street intersection, and when, upon returning, he reached the north side of the avenue he noticed a car coming from the east beyond the next street and about 300 feet away. He then looked up the avenue in the opposite direction, and upon turning his head back noticed the car "coming along at a terrible speed," but 20 or 30 feet distant. The fore part of the buggy was then on the track, and in going across the collision occurred. According to the testimony in behalf of plaintiff his horse trotted until reaching the avenue, and then walked, and the car was moving at a speed of 25 or 30 miles an hour. On the contrary, defendant's evidence tended to prove that the horse was trotting at $4\frac{1}{2}$ to 6 miles an hour until the track was reached, and that the car was moving at from 6 to 8 miles an hour and was slowed down to about four miles an hour at the time of the collision. There was a dispute in the evidence as to whether the gong sounded, and the distance from where plaintiff saw the car to the center of the track is estimated by appellant to be about 22 feet and by appellee at 28 feet.

The night was dark, and the jury might have found that the velocity of the car was 25 or 30 miles an hour. The jury also might have found that, while plaintiff knew it was coming, he was not aware of its excessive speed, and, if so, in the exercise of ordinary care, might have assumed that it was approaching at a reasonable rate of speed. Upon observing a car in the distance the driver of a vehicle can neither recklessly drive upon the crossing in a race with the car, nor is he arbitrarily required to stop his vehicle and await for its passage. The right of each to the use of the highway is protected, and neither is permitted recklessly to expose the other to danger. If the driver observes a car on the line at such distance that in the exercise of ordinary prudence he believes he can safely cross, and in undertaking to do so a collision occurs, this cannot be attributed to negligence on his part. *Patterson v. Townsend*, 91 Iowa, 725, 59 N. W. 205; *Ward v. Marshalltown L. P. & R. Co.*, 132 Iowa, 579, 108 N. W. 323. As observed in *Chauvin v. Detroit United Ry. Co.*, 135 Mich. 85, 97 N. W. 160, if one were always chargeable with negligence for driving upon a track when an approaching

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car is in sight, there are many places which could never be crossed without fault. Pedestrians or drivers of teams have as much right to the street as the street car company, and are not required to desist from traveling over any part of it because of the running of cars thereon. All exacted is that reasonable prudence with reference to their operation be exercised by them to avoid injury, and when in so doing it can be said that they reasonably believe a crossing can be made in safety they may go over without laying themselves open to the charge of negligence. *Omaha St. Ry. Co. v. Mathiesen*, 73 Neb. 820, 103 N. W. 666; *Richmond Traction Co. v. Clarke*, 101 Va. 382, 43 S. E. 618; *San Antonio Traction Co. v. Upson*, 31 Tex. Civ. App. 50, 71 S. W. 565; *Chicago City R. Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990; *United R. & E. Co. v. Watkins*, 102 Md. 264, 62 Atl. 234; *Indianapolis Street R. Co. v. O'Donnell*, 35 Ind. App. 312, 73 N. E. 163; *Callahan v. Philadelphia Traction Co.*, 184 Pa. 425, 39 Atl. 222; *Lawler v. Hartford Street R. Co.*, 72 Conn. 74, 43 Atl. 547. These decisions illustrate the application of the rule as stated in different situations. Appellant has cited a number of cases discussing the duty of looking and listening before attempting to cross a street car line. The point is not involved here, for plaintiff did look, and was aware of the approach of the car, though not of its excessive speed. In looking up the road to the east he saw the car; but, observing a reasonable precaution for his safety, upon turning his head back, the car had moved so rapidly that it was but 20 or 30 feet away. With the front wheel of his vehicle then on the track what was he to do, back up or go ahead? In view of the emergency in which he was placed, it cannot be said as a matter of law that prudent men would have done one way rather than the other, and therefore it was for the jury to say whether in what he then did there was any want of ordinary care. So, too, when he first observed the car, he had, as an ordinarily prudent man, the right to think he could cross the track driving on a walk before it reached him. It does require a very nice calculation to show that with his horse walking at an ordinary gait, and the car moving at a speed such as the jury might have found reasonable, though up to the limit short of excessive, the plaintiff might have passed in safety; and this being so, the issue as to whether in undertaking to cross as he did plaintiff was guilty of contributory negligence was rightly left to the jury.

Affirmed.

MILLER v. BALTIMORE & O. S. W. R. Co.

(Supreme Court of Ohio, June 9, 1908.)

[85 N. E. Rep. 499.]

Negligence—Parties Liable—Proximate Results.*—In an action to recover damages for injuries sustained through the negligence of another, the law regards only the direct and proximate results of the negligent act as creating a liability against the wrongdoer.

Same.*—In contemplation of law, an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable.

Damages—Fright—Personal Injuries.†—No liability exists for acts of negligence causing mere fright or shock, unaccompanied by contemporaneous physical injury, even though subsequent illness results, where the negligent acts complained of are neither willful nor malicious.

(Syllabus by the Court.)

Error to Circuit Court, Ross County.

Action by Elizabeth Miller against the Baltimore & Ohio Southwestern Railroad Company. Judgment of the court of common pleas sustaining demurrer to the second cause of action was affirmed by the circuit court, and plaintiff brings error. Affirmed.

Suit was brought by the plaintiff in error, Elizabeth Miller, in the court of common pleas of Ross county against the Baltimore & Ohio Southwestern Railroad Company to recover damages for alleged injuries to her property and person, caused, as she averred, by the negligence of said railroad company. To her original petition a motion was addressed, asking that the averments of said petition be made definite and certain. This motion was sustained by the court, and leave was given her to file an amended petition instanter, whereupon she filed the following pleading:

"First Cause of Action:

"(1) Plaintiff for a first cause of action says: That the defendant is, and was at the time of the commission of the grievances hereinafter complained of, a corporation duly incorporated under the laws of the state of Ohio, owning and operating a certain railroad known as the Baltimore & Ohio Southwestern Railroad Company, in the city of Chillicothe, Ohio, and maintaining in said city yards, locomotives, and tracks for the purpose of switch-

*See foot-note appended to *Florida, etc., Ry. Co. v. Wade* (Fla.), 25 R. R. R. 611, 48 Am. & Eng. R. Cas., N. S., 611.

†See foot-note appended to *Stewart v. Arkansas So. R. Co.* (La.), 13 R. R. R. 330, 36 Am. & Eng. R. Cas., N. S., 330; second foot-note appended to *Simone v. Rhode Island Co.* (R. I.), 23 R. R. R. 384, 46 Am. & Eng. R. Cas., N. S., 384.

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ing cars and making up trains. That a portion of said yards and tracks are contiguous to and run parallel with East Seventh street, between McArthur and Water streets, in said city.

“(2) That at the time hereinafter mentioned plaintiff owned and resided in certain premises, consisting of a dwelling house and lot of land, located upon the northwest corner of said Seventh and McArthur streets, said dwelling house being situated about 70 feet west of the western termini of the said tracks used by said defendant for switching purposes.

“(3) That defendant in the laying and construction of the aforesaid switching tracks was guilty of gross negligence and carelessness in failing to erect and place at said western termini of said tracks a bumping post, or some other suitable device for the purpose of preventing cars from being run or shoved off of said western termini of said tracks, so that, unless great care was used by said defendant in the switching of its said cars, they were liable to be pushed off the western termini of said tracks, across said McArthur street and onto plaintiff's premises, of all of which defendant had full knowledge and notice.

“(4) That on the 24th day of November, 1903, by reason of the gross carelessness and negligence of the defendant, and its agents, servants and employees in switching, running, operating, and managing a locomotive, to which were attached several cars, a number of said cars were, with great speed, run off the western terminus of one of the aforesaid tracks and shoved across said McArthur street and the lot of said plaintiff, a distance of 70 feet, and thrown against her said dwelling house with great force and violence, whereby the southern and eastern walls and two interior partitions of said house were shattered and destroyed.

“(5) That, by reason of the said gross carelessness and negligence of the defendant, the remaining walls, partitions, and structure of said house have been permanently injured and weakened; that 15 feet of fencing and 3 blocks of cement paving appurtenant to said dwelling and belonging to said plaintiff were destroyed, and that two carpets of the value of \$12 and a step-ladder of the value of \$3 belonging to said plaintiff were struck, run over, and completely ruined by said cars at the time hereinbefore named.

“(6) That, in consequence of the foregoing, part of plaintiff's said dwelling house was rendered unfit for occupancy, and that plaintiff was unable to, and did not, use part thereof for seven months. That all of these matters were without fault or negligence on the part of plaintiff, and, by reason of all the premises hereinbefore set forth, she suffered damage in the sum of five hundred (\$500) dollars.

“Second Cause of Action:

“Plaintiff, for a second cause of action, refers to the foregoing cause of action making the first four paragraphs thereof a part

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hereof as though herein fully pleaded and set out at length, and says: That at the time therein named she was standing on her said premises at a point between her said dwelling house, and said McArthur street, and within a few feet of the point where said cars struck her said dwelling house, and by reason of the gross carelessness and negligence of the defendant, whereby her property was shattered and destroyed, she suffered a sever nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health. That in the employment of physicians to heal and cure her she incurred expenses amounting to sixty dollars (\$60), and was, by reason of said injury, for three months unable to perform ordinary work, and has, in consequence of such inability to perform the work aforesaid, sustained loss in the sum of one hundred dollars (\$100), and that, by reason of said shock, has been permanently injured in her person and health, and damaged thereby in the sum of twenty-five hundred dollars (\$2,500), including said claim for inability to perform work and expenses incurred for medical service. Plaintiff therefore says that, by reason of the premises set forth in the foregoing causes of action, she has been damaged in her person and property in the sum of three thousand dollars (\$3,000), for which she prays judgment against said defendant."

To the second cause of action in said amended petition the railroad company demurred, alleging as ground of demurrer that the facts therein stated were not sufficient to constitute a cause of action against it, and in favor of the plaintiff, Elizabeth Miller. This demurrer was sustained by the court of common pleas, and, the plaintiff not desiring to amend said cause of action or to plead further, said second cause of action was by the court dismissed and ordered to be stricken from the amended petition. This judgment of the court of common pleas sustaining said demurrer and dismissing said second cause of action was affirmed by the circuit court. Elizabeth Miller prosecutes error, and asks that the judgments of both of said courts be reversed.

Wallace D. Yaple, for plaintiff in error.

Edward Barton and *John P. Phillips*, for defendant in error.

CREW, J. (after stating the facts as above). The amended petition in this case contained two alleged causes of action, each separately stated and numbered. The wrong complained of by plaintiff in her first cause of action was that the defendant railroad company in operating and managing a certain locomotive to which were attached a number of cars negligently and with great force shoved or pushed said cars off of the end of its switch track across a public street and against and into the dwelling house of plaintiff, thereby injuring and damaging said dwelling house and other property of the plaintiff to the extent of \$500. As a

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second and separate cause of action, she alleged that at the time of said accident she was standing on her own premises within a few feet of the point where said cars struck her dwelling house, and in consequence, and as the result of witnessing said accident, "she suffered a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health." There was no claim or allegation in said petition that plaintiff at the time of said accident received any actual bodily injury, or that the negligence of the defendant was willful or wanton. A demurrer addressed to this second cause of action was sustained by the court, and said cause of action was dismissed, and the present record presents for determination the single question whether or not in an action for negligence, unaccompanied by any element of wantonness or intentional wrong, there can be a recovery of damages for alleged physical injury caused by mere fright or shock. While the precise question thus presented has not heretofore been determined by this court it has received the consideration of, and been decided by, courts of last resort in many of the other states; and the right to recover for injuries so caused has been almost universally denied. In the case of *Ewing & Wife v. P. C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709, a case very like the present case, the plaintiffs alleged in their petition, as and for their cause of action, that in consequence of a collision of trains on defendant's railway "the cars of the defendant company were broken, overturned, and thrown from the track, and fell upon the lot of ground and premises of the plaintiffs, and against and upon the dwelling house of plaintiffs, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing, then being in said dwelling house, and subjected her to great fright, alarm, fear, and nervous excitement and distress, whereby she then and there became sick and disabled, and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby permanently weakened and disabled, and that she was and is thereby otherwise injured and damaged, wherefore she claims damages in the sum of \$5,000, and demands judgment therefor." To this petition the railway company demurred, and the common pleas court entered judgment for the defendant on said demurrer. This judgment was affirmed by the Supreme Court. The syllabus of the case is as follows: "A statement of claim averring that, by a collision on defendant's railroad, through the negligence of defendant's employees, the cars were derailed and thrown against plaintiff's dwelling, subjecting her to fright and to nervous excitement, permanently weakening and disabling her, exhibits no cause of action. Mere fright, occasioned by such an accident, producing permanent in-

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jury to the nervous system, is a result too remote to be actionable. No well-considered case has held that fright alone, not resulting from or accompanied by some physical injury to the person, will sustain an action for negligence." In *Spade v. Lynn & Boston Railroad Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, the declaration of plaintiff, after charging certain specific acts of negligence on the part of defendant's agents and servants, alleged that defendant "thereby frightened the plaintiff and subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated, and suffered and has continued to suffer great mental and physical pain and anguish, and has been put to great expense." The syllabus of the case is as follows: "In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance." In the opinion the court say: "The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met." In *Gulf, Colorado & Santa Fe Railway Co. v. Trott*, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866, the plaintiff claimed and was allowed damages in the county court for alleged negligence on the part of the railway company, whereby plaintiff's team of horses, hitched to a wagon in which plaintiff was traveling, became frightened and broke the wagon, putting plaintiff in fear for his own personal safety, and causing him, as he alleged in his complaint, "great mental suffering, vexation, and anxiety of mind." There being evidence tending to support these allegations, the jury was instructed that if plaintiff was frightened and put in fear of his personal safety, and was caused mental pain or anxiety, they should allow him reasonable compensation therefor. Under the practice in that state, the court of Civil Appeals certified to the Supreme Court the following questions for decision: "(1) In an action for damages based upon tortious and negligent conduct of a defendant, where the wrongful act causes damage to plaintiff's property, but no physical

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injury to plaintiff, is mental suffering an element of actual damages? (2) Can actual damages be recovered for mental suffering when there is no physical injury, no injury to property, nor other element of actual damages?" The court responded: "We are of opinion that these questions should be answered in the negative. So far as we have been able to discover, all the cases involving the question of the right to recover for fright alone are in accordance with that holding." In *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, it was held: "No recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." The facts of that case were as follows: Plaintiff was standing upon a cross-walk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. The court in the opinion say: "Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. If the right of recovery

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in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy." In *Atchison, Topeka & Santa Fe Ry. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453, the court say: "The jury found that the plaintiff below was damaged \$65 by reason of peril and fright. Damages of this kind are too remote. A person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because he had been placed in a perilous position. Nor is mere fright the subject of damages. Fright must be accompanied by some actual injury caused thereby, and traceable directly thereto, to be the subject of damages. Mere fright, unaccompanied by any injury resulting therefrom, cannot be the subject of damages." In *Victorian Railway Com'rs v. Coultas*, 13 Law Reports, Appeal Cases, 222, the facts were that the gatekeeper at a railway crossing negligently permitted the plaintiff's carriage to cross the railway track just as a train was approaching. The approach of the train was discovered by the driver of the carriage in time to prevent a collision, but the peril was imminent, and the plaintiff, a woman, was greatly frightened. It was said by Sir Richard Couch in the opinion in that case: "The rule of English law as to the damages which are recoverable for negligence is stated by the Master of the Rolls in *The Notting Hill*, 9 P. D. 105, a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act. According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper. If it were held that they can, it appears to their Lordships it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the

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negligent act would be greatly increased, and a wide field opened for imaginary claims." *Schoffer et al., Ex'rs, v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070, was a suit to recover damages for the death of one Charles Scheffer, who was injured by the negligence of the defendant railroad company, and as a result of the injuries received he became insane, and while in that condition committed suicide. Mr. Justice Miller in the course of the opinion in that case in discussing the relation of defendant's negligence to the cause of death said: "The proximate cause of the death of Scheffer was his own act of self-destruction. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death." The same general rules and principles announced and applied in the foregoing decisions are recognized and find support in the following additional cases: *White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Smith v. Postal Telegraph Cable Co.*, 174 Mass. 576, 55 N. E. 380, 47 L. R. A. 323, 75 Am. St. Rep. 374; *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; *Kansas City, Ft. Scott & Memphis Railroad Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645; *Haile's Curator v. Texas & Pacific Ry. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Sanderson v. Railway Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509; *Deming v. C., R. I. & P. Railway Co.*, 80 Mo. App. 152; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Canning v. Inhabitants of Williamstown*, 1 Cush. (Mass.) 451. See, also, *Morton v. Western Union Telegraph Co.*, 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. Rep. 648.

There is a line of cases found in the reports in which it is held by the courts that the rule requiring actual physical injury or bodily hurt, in order to warrant a recovery in negligence cases for mental distress or nervous shock, does not apply where the negligent act complained of is committed by the defendant will-

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fully, wantonly, or maliciously. And there is yet another class in which it is held that if the physical injury is the natural, probable, and proximate result of a nervous condition, which itself is the natural and proximate consequence of the defendant's negligence, that then there may be a recovery in damages, irrespective of any bodily injury to plaintiff at the time of his fright or mental shock. Many of, if not all, the cases cited by counsel for plaintiff in error in support of the contention here made by him, fall within one or the other of these two classes, and in consequence they are clearly distinguishable from the case at bar, and need not here be discussed. In the present case the plaintiff, Elizabeth Miller, does not allege intentional and willful negligence on the part of the defendant, nor does she claim that defendant knew, or could reasonably have anticipated, that its negligent act of which she complains would cause her "severe nervous shock, great bodily pain and mental anguish, and permanent injury to her person and health." The rule is elementary that a defendant in an action for negligence can be held to respond in damages only for the immediate and proximate result of the negligent act complained of, and in determining what is direct or proximate cause the rule requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act. Being of opinion that, measured by this rule, the injury complained of by Elizabeth Miller in her second cause of action is not such that the defendant railroad company is legally liable therefor, we hold, both upon that ground, and upon the ground of public policy, that in a case like the present no legal liability can be predicated upon injury resulting from mere fright or nervous shock.

The judgments of the courts below are affirmed.

PRICE, C. J., and SHAUCK, SUMMERS, SPEAR, and DAVIS, JJ., concur.

ATCHISON, T. & S. F. RY. CO. *v.* BAKER.

(Supreme Court of Oklahoma, May 13, 1908.)

[95 Pac. Rep. 435.]

Negligence—Contributory Negligence—Last Clear Chance.*—Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributory negligence on his part will not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

(Syllabus by the Court.)

Appeal from the United States Court for the Northern District of the Indian Territory; Hosea Townsend, Judge.

On rehearing. Reversed and remanded.

For former opinion, see 104 S. W. 1182.

KANE, J. This case was submitted to the Court of Appeals of the Indian Territory before statehood, and an opinion handed down reversing the judgment of the lower court. The opinion of the Court of Appeals is reported in 104 S. W. 1182. The statement of facts by Mr. Justice Townsend fully covers the case, and we will not repeat it here. A petition for rehearing was filed in due time, and was undisposed of when this court succeeded the Court of Appeals upon the admission of the Indian Territory and the territory of Oklahoma into the Union as the state of Oklahoma. This court sustained the petition for rehearing, and the cause was submitted to this court upon briefs and oral argument.

After a careful examination of the record and a review of the authorities cited by counsel in their briefs and very full and able oral arguments we are convinced that the judgment of the court below ought to be reversed and the cause remanded for a new trial. In order, however, that there may be no misapprehension when the cause comes on to be tried below, we wish to notice some features of the case which were apparently overlooked by our Brothers of the Court of Appeals.

We agree with the Court of Appeals that it was reversible error for the court below to submit to the jury the question of gross negligence or willful or intentional injury in that part of its in-

*See first foot-note appended to *Doherty v. Des Moines City Ry. Co.* (Iowa), 27 R. R. R. 477, 50 Am. & Eng. R. Cas., N. S., 477; first foot-note appended to *Smith v. Connecticut Ry. & L. Co.* (Conn.), 27 R. R. R. 261, 50 Am. & Eng. R. Cas., N. S., 261.

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struction No. 9, which reads as follows: "The jury are instructed that, if they believe from the evidence in this case that plaintiff was guilty of negligence which materially contributed to the accident by driving upon the track of the railroad without first stopping and looking and listening to see if a train was approaching, then the defendant cannot be found guilty in this case, unless you believe from the evidence that the defendant's servants were guilty of willful or intentional acts, and the injury was occasioned by such willful or intentional acts of omission or commission on the part of the defendant's servants or employees." There is no allegation in the complaint of willful or intentional acts of commission or omission on the part of the plaintiff in error, its servants, or employees; neither was there any proof that reasonably tended to indicate any willful or intentional acts of commission or omission. There being no allegation in the complaint or evidence in the record upon which to predicate such instruction, it was error to give it. The authorities cited by the Court of Appeals in its opinion, *supra*, to wit, *East Tenn. Coal Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062, *Jacquin v. Grand Ave. Cabel Co.*, 57 Mo. App. 320, *Greathouse v. Croan* (an Indian Territory case) 4 Ind. T. 668, 76 S. W. 273, fully support this proposition.

On the other instructions criticised we cannot agree with the Court of Appeals. The following instruction was requested by the plaintiff in error, and refused by the court: "The jury are instructed that, if they find from the evidence that the plaintiff, Baker, could have seen the train, and could have heard the train by looking and listening, and you find from the physical facts that he could have seen the train had he looked and heard the train had he listened, notwithstanding the fact that he has testified that he looked and listened and neither saw nor heard the approaching train, then you should find for the defendant." Another instruction requested is the following: "The court instructs the jury that, if plaintiff, Baker, saw the train approaching, and yet undertook to cross the track instead of waiting for the train to pass, and was injured thereby, you must find for the defendant." This the court refused, and gave to the jury the following instruction: "The court instructs the jury that, if the plaintiff, Baker, saw the train approaching in time to avoid the injury by the exercise of ordinary caution, and yet undertook to cross the track instead of waiting for the train to pass, and was injured thereby, you must find for the defendant." Of the first instruction quoted above the Court of Appeals says: "This instruction unquestionably states the law correctly"—and of the second: "This would imply, regardless of the question as to whether he had looked and listened for the train, if he did not see the train in time to avoid the injury after he saw the train by the exercise of ordinary care and caution, he was entitled to recover. This, in our judgment, would not be stating the law correctly." To our mind both of

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the instructions requested were properly refused, because they deprived the defendant in error of the benefit of the doctrine of the last clear chance. The instruction as modified and given is subject to the same criticism.

Let us now see what this doctrine of the last clear chance is, and if we are right in holding that the case at bar is one where it may properly be invoked. The Supreme Court of the United States, in the case of *Inland & Sea-Board Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, states the doctrine as follows: "There is another qualification of this rule of negligence which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.' The qualification of the general rule as thus stated is supported by decisions of high authority, and was applicable to the case on trial." The Court of Appeals and all parties to this suit concede that the above doctrine was in force in the Indian Territory at the time this cause was tried; but counsel for plaintiff in error and the Court of Appeals in its opinion insist that there was no evidence reasonably tending to show a want of ordinary care on the part of the plaintiff in error after the dangerous situation of defendant in error was discovered. Mr. Justice Townsend in his opinion, *supra*, says: "There was not a particle of evidence to support the theory that the train could have been stopped before reaching the crossing and the accident avoided, and to submit to the jury a theory not supported by any evidence was error."

The evidence of the engineer is to the effect that when he was 300 or 400 feet from the crossing he saw the defendant in error acting as though he was deliberately approaching the crossing. The following is taken from his evidence as it appears in the record: "Q. Where were you with reference to this crossing—about how far were you north of the crossing when you first discovered Mr. Baker's team, according to your best judgment? A. We must have been 300 or 400 feet. Q. Where was Baker and his team with reference to the crossing when you discovered him? A. Him and his team and wagon and all was inside of the right of way. Q. Well, where did Mr. Baker seem to be going, driving along? A. He seemed to be deliberately driving over the crossing." There is no room to doubt that the engineer, when he first discovered the defendant in error, got the impression from his conduct that he was going to drive upon the railroad track ahead of his train. The engineer does not pretend that he was

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in any way deceived by appearances, but testified that he acted upon the impression that the defendant in error was deliberately crossing the track, and he testified that he acted on this impression and did all he reasonably could to stop his train and avoid the injury. If this evidence was uncontradicted, the Court of Appeals would have been right in its conclusion that a verdict should have been directed. But to our mind there was evidence reasonably tending to contradict the evidence of the engineer on this point. This being so, it was proper to submit to the jury the question as to whether the plaintiff in error, after discovering the dangerous situation of the defendant in error, exercised reasonable care and prudence to avoid the injury. The engineer further testified on cross-examination that the train was made up of one combined coach and baggage car and one day coach; that the coaches were probably 70 feet long.

Mr. T. C. Connor, express messenger and baggageman on the train, called as a witness on behalf of plaintiff in error, testified, in part, as follows: "Q. Now, when the engineer put on the emergency brakes or the air, how long was that before he stopped? A. That puts on all the brakes, and the train slacks. I judge it would stop within the length of the train. There were only two coaches on. Q. That is your best judgment? A. Yes, sir." The answer to the first question may not be entirely responsive; but it was evidently given with deliberation after making a mental calculation to determine how quickly this train could, under the circumstances, be stopped, and his best judgment was that it could be stopped with the length of the train, which would not exceed 250 feet at the most. The witness was testifying in behalf of the railway company, and was telling of the effort the engineer made to stop the train. This evidence was introduced without objection, and certainly fairly tends to prove that if the engineer had applied the emergency brakes when he first saw defendant in error in a place of danger he could have stopped the train before reaching the crossing and avoided the injury, thus contradicting the engineer's evidence on this point. This evidence is not mentioned by counsel for defendant in error in his brief; but it was earnestly urged upon the attention of the court by oral argument. We believe it was sufficient to send the case to the jury on the question of the exercise of reasonable care on the part of plaintiff in error after it discovered the dangerous situation of defendant in error. Admitting the contributory negligence of the defendant in error may have had something to do in causing the injury, yet it would have been error for the court below to have directed a verdict for the plaintiff in error with this evidence in the record.

If plaintiff, injured in a collision at a railroad crossing, used due diligence after discovering his peril, he can recover, though he was negligent in not stopping and listening, provided defendant,

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after seeing the danger, failed to use due care. *Highland Ave. & B. R. Co. v. Sampson*, 91 Ala. 560, 8 South. 778.

A railroad company is liable for injuries received by one in attempting to cross the track in front of a moving train, even though such person is guilty of contributory negligence, if, after discovering his perilous position, the employees having charge of the train failed or neglected to use all possible effort to avoid the injury. *Maryland Cent. R. Co. v. Neubaur*, 62 Md. 391.

With the foregoing modifications, we believe the opinion of the learned Court of Appeals states the law of the case.

It is therefore ordered that the judgment of the court below be reversed, and the cause remanded, with directions to grant a new trial. All the Justices concur.

HERMELING v. CHICAGO, ST. P., M. & O. RY. CO. *et al.*

(Supreme Court of Minnesota, July 24, 1908.)

[117 N. W. Rep. 341.]

Railroads—Injury to Person on Track—Contributory Negligence.*
—Plaintiff's intestate attempted to cross a railroad track at night in the face of an approaching train, 40 feet away and running at the rate of about 4 miles an hour, of which he was fully aware. He stumbled in the darkness, or was thrown down by the train, and was killed. Held, on this undisputed state of the facts, that he was guilty of contributory negligence as a matter of law.

(Syllabus by the Court.)

Appeal from District Court, Cottonwood County; P. E. Brown, Judge.

Action by Katie Hermeling, administratrix of Joseph Hermeling, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Charles Wetmore. Verdict for defendants. From an order denying a new trial, plaintiff appeals. Affirmed.

Larrabee & Davics, for appellant.

James B. Sheehan, for respondents.

BROWN, J. The facts in this case are as follows: On the night of October 11, 1906, defendant ran a special excursion train from Currie, in Murray county, to Windom, in Cottonwood

*See second foot-note appended to *Harris v. Southern Ry. Co.* (Ga.), 27 R. R. R. 508, 50 Am. & Eng. R. Cas., N. S., 508; foot-note appended to *Drawdy v. Atlantic Coast Line R. Co.* (S. Car.), 27 R. R. R. 523, 50 Am. & Eng. R. Cas., N. S., 523; foot-note appended to *McQuisten v. Detroit Citizens' St. Ry. Co.* (Mich.), 26 R. R. R. 122, 19 Am. & Eng. R. Cas., N. S., 122; *Duffy v. Atlantic & N. C. R. Co.* (N. Car.), 26 R. R. R. 102, 49 Am. & Eng. R. Cas., N. S., 102.

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county, to enable people who so desired to attend a political meeting at the last-named place. A special excursion train was also run from St. James to Windom. The lines of defendant's road from Currie and St. James meet at Bingham Lake, and all trains proceed from that point to Windom, on the same track. The Currie track parallels that of the main line at Bingham Lake as it extends through the station yards and past the depot; the main track being immediately adjacent to the station platform. Between the two tracks there is a platform 16 feet wide and about 100 feet long. The platforms are connected by two walks, extending over the main track and used for convenience in passing to trains on the Currie track. These platforms, both that between the main and the Currie track and that adjoining the building, are about on a level with the rails of the track, though the space between the rails is not planked. The bed of the main track is between 6 and 8 inches below the surface of the platforms. On the night in question, at about 8 o'clock, plaintiff's intestate was a passenger on the Currie special, bound for Windom to attend the political meeting. As the train came to a stop at Bingham Lake, he alighted and crossed the main track to the station building, which he entered and there engaged in conversation with an acquaintance. He understood that his train would not depart for Windom until after the arrival of the train from St. James, and he remained at the station until the latter came in. On its approach, and when within 40 feet of the position he occupied on the platform, and coming at about the rate of 4 miles an hour, he attempted to cross the track in front of it to board his train, and in some manner slipped and fell on the track, or was struck and knocked down by the engine, and was run over and killed. Plaintiff, administratrix of deceased's estate, brought this action against both the company and its engineer, alleging that the death of the intestate was occasioned by their negligence. A verdict was directed for defendants on the trial below, and plaintiff appealed from an order denying a new trial.

It is charged in the complaint that the death of plaintiff's intestate was caused solely by the negligence of defendants, the grounds of which are specifically set out in the pleadings; the principal one being the failure of the company to have the station platform properly lighted on the occasion in question, by reason of which, so the complaint alleges, in attempting to pass over the main track to his train, not being able to see, deceased fell off the platform, as he started to cross the track, and was unable to get out of the way of the approaching train. Whether the company is chargeable with negligence in this respect involves the question whether deceased, while away from his train and at the station building, was a passenger within the meaning of the law, to whom it owed the duty properly to light the platform of its station or to take other affirmative measures for his safety. *Dekay v. Rail-*

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way Co., 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. Rep. 687. We are not agreed upon this branch of the case. Some members of the court are of the opinion that the case cited applies, and is conclusive that deceased was not entitled to protection as a passenger under the circumstances stated, while other members are of the opposite view. But we are all agreed, however, that the learned trial court properly directed a verdict for defendants on the ground of deceased's contributory negligence. It becomes unnecessary, therefore, to consider or determine the question of the company's negligence in the respects stated, or the negligence of either defendant in other respects charged in the complaint. Negligence may be conceded, for the purposes of the case, and we come to the contributory negligence of deceased.

Deceased had been in the employ of defendant as a section foreman for about six years preceding the time of his death. His railroad experience necessarily, familiarized him with the movements and operations of trains and dangers and hazards incident thereto. He was a passenger on the Currie special, bound for Windom. When the train reached the station in question, he left it, whether for some business purpose or not is immaterial, and crossed over the intervening track to the station platform, where he remained until the arrival of the St. James special. He was advised of the arrival of that train by the usual sounding of bell and whistle, and the headlight of the engine was immediately in his view as the train approached. When within 40 feet—some witnesses place the distance at 30 feet—from the point where he stood upon the platform, he deliberately stepped therefrom upon the track on which the train was approaching, with full knowledge of its presence and distance away, and was run down and killed. Whether he stumbled and fell in the darkness, or was struck by the engine in crossing the track, is in no proper sense controlling in determining the question of his contributory negligence. His conduct astonished several bystanders, and they called to him for the purpose of warning him of his danger; but he failed to heed them, and, with the train almost upon him, made a foolhardy attempt to cross ahead of it. Whether the platform was lighted or not, the conclusion is unavoidable that he attempted in the face of approaching danger to take the chance of passing over the track before the train could reach him. These facts are for the most part conceded by counsel for plaintiff, and where not conceded are established by uncontroverted evidence.

Counsel insists that the question of contributory negligence was for the jury. In this we do not concur. If upon facts like those presented in this case, and there is no substantial dispute about them, the question of contributory negligence must go to the jury, then we are unable to imagine a case where the court would

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be justified in declaring contributory negligence as a matter of law. Reasonable minds can reach from these facts but one conclusion, and that of gross negligence on the part of the deceased. The conclusion of the learned trial court is supported by numerous decisions of this court, which we here follow and apply. *Clark v. Railway Co.*, 47 Minn. 380, 50 N. W. 365; *Schneider v. Railway Co.*, 81 Minn. 383, 84 N. W. 124; *Stacklie v. Railway Co.*, 73 Minn. 37, 75 N. W. 734; *Nelson v. Railway Co.*, 76 Minn. 189, 78 N. W. 1041, 79 N. W. 530; *Sandberg v. Railway Co.*, 80 Minn. 442, 83 N. W. 411; *Olson v. Railway Co.*, 84 Minn. 258, 87 N. W. 843. Deceased was in no sense excused from the charge of negligence by the fact that the conductor in charge of his train had called "All aboard." *De Kay v. Railway Co.*, 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. Rep. 687. The likelihood of missing his train, if there was any danger of it, furnished no justification or excuse for his deliberate act in stepping in front of the approaching train. Nor have we the right to assume, as counsel for plaintiff suggest, that deceased did not notice the approaching train, but relied upon the presumption that it was safe for him to cross the track. Whatever presumptions may be indulged in favor of the rightful and prudent conduct of deceased persons, the evidence in the case at bar is far too conclusive that deceased was fully aware of his situation to warrant any inference to the contrary.

Order affirmed.

WADE *v.* WESTERN MARYLAND R. CO.

(Supreme Court of Pennsylvania, April 20, 1908.)

[69 Atl. Rep. 1112.]

Railroads—Accident at Crossing—Contributory Negligence.*—

Where one man borrows a wagon and another a horse, and set out on a joint expedition, the one driving who borrowed the wagon, it is the duty of both to stop the team and look and listen before crossing the track.

Same—Presumptions.†—Where two men driving a team are killed at a railroad crossing, the presumption that they stopped, looked, and listened held overcome by testimony of the only witness who saw the accident.

Appeal from Court of Common Pleas, Franklin County.

Action by Hermie K. Wade against the Western Maryland Railroad Company. From an order refusing to take off a non-suit, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Sharpe & Elder and *J. A. Strite*, for appellant.

O. C. Bowers and *J. R. Ruthrauff*, for appellee.

BROWN, J. The appellant's husband and a man named Shindler, while attempting to cross the tracks of the Western Maryland Railroad Company in an open wagon, were struck by a passenger engine and instantly killed. The collision took place in the borough of Waynesboro, at the intersection of Second street with the roadbed of the appellee. The team was in the joint use and possession of the deceased at the time they were killed. The horse had been borrowed by Wade and the wagon by Shindler. With this team they started out three or four hours before they were killed to look for a horse of Shindler's that had

*For the authorities in this series on the question whether the negligence of those controlling the movements of vehicles is imputable to others riding with them, see extensive note, 10 R. R. R. 114, 33 Am. & Eng. R. Cas., N. S., 114; foot-note appended to *Shultz v. Old Colony St. Ry.* (Mass.), 25 R. R. R. 782, 48 Am. & Eng. R. Cas., N. S., 782; *Baker v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 760, 48 Am. & Eng. R. Cas., N. S., 760; foot-note appended to *Thompson v. Pennsylvania R. Co.* (Pa.), 25 R. R. R. 695, 48 Am. & Eng. R. Cas., N. S., 695; foot-note appended to *Southern Ry. Co. v. King* (Ga.), 24 R. R. R. 785, 47 Am. & Eng. R. Cas., N. S., 785.

†For the authorities in this series on the subject of the sufficiency of evidence to rebut the presumption of due care on the part of a person killed by a train or car, see last foot-note appended to *Rogers v. Rio Grande W. Ry. Co.* (Utah), 27 R. R. R. 567, 50 Am. & Eng. R. Cas., N. S., 567; *Schwartz v. Delaware, etc., R. Co.* (Pa.), 25 R. R. R. 10, 48 Am. & Eng. R. Cas., N. S., 10.

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strayed away. Immediately before the collision they stopped at a house where Wade got a rooster and Shindler a fish net. They then proceeded towards the railroad, Shindler driving, but there is nothing in the case to sustain the contention of the appellant that her husband was his guest or passenger, and the court below properly held that it was as much Wade's duty as Shindler's to stop the team and look and listen before crossing the railroad. The collision occurred about 6 o'clock on the evening of April 24, 1906, when it was clear and calm, and there was nothing to interfere with seeing or hearing the approach of the train. Two switches connected with the main track near the point of the collision. The switch immediately next to the track did not extend to Second street, but the other or western one did, and was about 15 or 20 feet from the track. On the first or western siding there were two gondola cars, and on the other there was a box car. The two gondola cars stood about flush with the south line of the street, and obstructed the view of the railroad from Second street to the south, the direction from which the train was coming, but, after passing them and the box car, there was a clear view of the track for at least a third of a mile.

Under the conditions as shown by the plaintiff, it is not disputed by her counsel that it was the duty of Shindler to stop, look, and listen before crossing the tracks; but, as stated, whatever duty was upon him rested equally upon his companion. Answer is made to this that, as it does not positively appear from the evidence that they did not stop, look and listen, the case ought to have gone to the jury on the presumption that they did. There is positive testimony, however, that they could not have stopped, looked, and listened, and the only possible conclusion is that they had not. As but one inference could have been drawn from the evidence on the question of the contributory negligence of the deceased, it was the duty of the court to draw it.

Leonard Johnson, the only witness called who saw the team approach the railroad, testified that he saw it turn from Ridge avenue onto Second street; that it proceeded east on that street towards the railroad crossing on a dog trot; that he saw it going at that pace until it reached the first switch or siding, about 16 feet from where it was struck by the engine; that when it was at that point, traveling at the pace stated, he turned from where he was standing on his porch, and had stepped into the hallway, about 12 feet, when he heard the crash. The testimony of Johnson completely overcomes the presumption that the deceased had exercised the care required of them when about to cross the railroad, and the learned trial judge, in refusing to take off the nonsuit, was constrained to say, "It is perfectly manifest, therefore, that they neither stopped, looked, nor listened." We can add nothing to this.

Judgment affirmed.

WILLIAMS *v.* LOUISIANA RY. & NAVIGATION CO.

(Supreme Court of Louisiana, April 27, 1908. Rehearing Denied May 25, 1908.)

[46 So. Rep. 528.]

Carriers—Ejection of Intruders—Liabilities.*—The forcible ejection by a conductor of even a trespasser from a rapidly moving train is a tort, and the railroad company is responsible for the resulting injury.

Appeal and Error—Review—Evidence.—When a case hinges on the credibility of witnesses, the judgment will not be disturbed, unless clearly erroneous.

Monroe, J., dissenting.

(Syllabus by the Court.)

Appeal from Fifth Judicial District Court, Parish of Winn; George Wear, Judge.

Action by Lu James Williams against the Louisiana Railway & Navigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wisc, Randolph & Rendall and *Orin Medicus Grisham*, for appellant.

Gamble & O'Connell, for appellee.

*For passenger cases, see *Sharer v. Paxson* (Pa.), 2 Am. & Eng. R. Cas., N. S., 429; *Holt v. Hannibal & St. J. Ry. Co.* (Mo.), 8 R. R. R. 294, 31 Am. & Eng. R. Cas., N. S., 294; *Indiana, etc., Ry. Co. v. Ditto* (Ind.), 4 R. R. R. 703, 27 Am. & Eng. R. Cas., N. S., 703.

For trespasser cases, see *Hayes v. Southern Ry.* (N. Car.), 24 R. R. R. 547, 47 Am. & Eng. R. Cas., N. S., 547 (liability for violent ejection from moving train; and proximate cause where trespasser, while being violently ejected from moving train, struck a post and was thrown under car); *Massell v. Boston Elec. Ry. Co.* (Mass.), 21 R. R. R. 57, 44 Am. & Eng. R. Cas., N. S., 57; *Krueger v. Chicago & A. Ry. Co.* (Mo.), 4 R. R. R. 400, 27 Am. & Eng. R. Cas., N. S., 400 (authority of brakeman to eject trespasser from moving train); *Toledo, etc., R. Co. v. Gordon* (C. C. A.), 20 R. R. R. 544, 43 Am. & Eng. R. Cas., N. S., 544; compelling trespasser to jump from moving train, at night, in a dangerous place, certain instruction as to the liability of the railroad company approved); *Johnson v. Chicago, etc., Ry. Co.* (Iowa), 11 R. R. R. 629, 34 Am. & Eng. R. Cas., N. S., 629 (negligence in ejecting from moving train was a question for jury); *Illinois Cent. R. Co. v. McManus* (Ky.), 2 R. R. R. 572, 25 Am. & Eng. R. Cas., N. S., 572; *Williams v. Southern Ry.* (Ky.), 7 R. R. R. 732, 30 Am. & Eng. R. Cas., N. S., 732 (liability for malicious act of brakeman in ordering boy from moving freight car); *McKeon v. New York, etc., R. Co.* (Mass.), 8 R. R. R. 375, 31 Am. & Eng. R. Cas., N. S., 375 (liability for reckless act of brakeman in ejecting trespasser from moving train); *Drolshagen v. Union Depot R. Co.* (Mo.), 18 R. R. R. 223, 41 Am. & Eng. R. Cas., N. S., 223 (motorman was not within scope of his employment in ejecting boy who was trying to ride on running board of street car); *Powell v. Erie R. Co.* (N. J.), 13 R. R. R. 615, 36

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LAND, J. This is a suit for damages for personal injuries. It involves only questions of fact. There was judgment below in favor of the plaintiff for \$1,000. Defendant has appealed.

Plaintiff and another young negro man one night boarded defendant's local passenger train near Alonzo Station, six miles from Winnfield. They got on the rear platform of the last coach, reserved for white people, and there remained sitting on the steps until the train was near Winnfield. The conductor, lantern in hand, passed through the coach and out upon the platform. The two negroes were either ejected or voluntarily jumped from the train, moving at the rate of some twenty miles an hour. The conductor's testimony is to the effect that he saw plaintiffs hanging with one hand from the platform, and, that, on the third demand for his fare, the plaintiff jumped off. Plaintiff's testimony is, in substance, that the conductor made no demand for fare, but kicked him on the leg, thereby knocking him off the train. Two white men, sitting on the rear seat of the same coach, saw the conductor pass out to the platform, and then heard a yell, and one of them saw, through the window, a man falling face downward. The conductor came back, appearing somewhat excited, and was asked: "Did you kick him off?" He replied: "No, he jumped off." The two white witnesses heard no demand for fare, and one of them testified that the yell was accompanied by a noise "like some one kicking a dog."

Am. & Eng. R. Cas., N. S., 615 (not liable for injury to trespasser who let go moving train because of threats); *Richmond Traction Co. v. Wilkinson* (Va.), 7 R. R. R. 723, 30 Am. & Eng. R. Cas., N. S., 723 (ejection of child from moving street car); *Johnson v. Chicago, etc., Ry. Co.* (Iowa), 1 R. R. R. 504, 24 Am. & Eng. R. Cas., N. S., 504; *Powell v. Erie R. Co.* (N. J.), 13 R. R. R. 615, 36 Am. & Eng. R. Cas., N. S., 615 (right to use force in ejecting trespasser climbing upon moving train); *Johnson v. Chicago, etc., Ry. Co.* (Iowa), 1 R. R. R. 504, 24 Am. & Eng. R. Cas., N. S., 504; statute making act of boarding moving train an offense was no defense in action for forcible ejection from such a train); note, 19 Am. & Eng. R. Cas., N. S., 754; note, 22 Am. & Eng. R. Cas., N. S., 171; note, 20 Am. Eng. R. Cas., N. S., 445; *Chesapeake & O. R. Co. v. Anderson* (Va.), 9 Am. & Eng. R. Cas., N. S., 136; *Cook v. Southern Ry. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 591 (ejection by brakeman acting without authority, liability for); *Enright v. Pittsburg Junction R. Co.* (Minn.), 20 Am. & Eng. R. Cas., N. S., 564 (liability for injury to infant trespasser ejected from moving train); *Mugford v. Boston & M. R. R.* (Mass.), 16 Am. & Eng. R. Cas., N. S., 684 (liability for injury to trespasser ordered from moving car); *Johnson v. Chicago, etc., Ry. Co.* (Iowa), 15 Am. & Eng. R. Cas., N. S., 683 (liability for violent ejection from moving train of trespasser who had been repeatedly ordered off); *Bolin v. Chicago, etc., Ry. Co.* (Wis.), 19 Am. & Eng. R. Cas., N. S., 735 (ordering from moving train does not tend to show intent to willfully injure); *Faber v. Missouri Pac. Ry. Co.* (Mo.), 7 Am. & Eng. R. Cas., N. S., 700; *Galveston, etc., Ry. Co. v. Zant-zinger* (Tex.), 13 Am. & Eng. R. Cas., N. S., 840 (trespasser on train forced by pain and fear to jump from it was not guilty of contributory negligence).

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No useful purpose would be subserved by reviewing the evidence in detail. The question was one of credibility, and we are not prepared to say that the finding of the trial judge was clearly erroneous. *Moret v. N. O. Rys. Co.*, 112 La. 863, 36 South. 759.

We consider the question whether or not the plaintiff intended to steal a ride to be immaterial. If plaintiff, though a trespasser, was forcibly ejected by the conductor of the moving train, the defendant is responsible for the resulting injury. *Jackson, Tutor v. Railroad Company*, 52 La. Ann. 1706, 28 South. 241.

Plaintiff sued for \$2,500, and was allowed \$1,000, as damages. He was painfully injured about his face and head. The award is not assailed in this court as excessive.

Judgment affirmed.

MONROE, J., dissents.

CHICAGO, I. & L. RY. CO. v. HOSTETTER.

(Supreme Court of Indiana, May 1, 1908.)

[84 N. E. Rep. 534.]

Carriers—Shipment of Live Stock—Duties in Transportation.*—Though at common law in the shipment of live stock the duty devolves on the carrier and not on the shipper to give the necessary care and attention, the carrier may, to an extent at least, absolve itself from this duty by a provision in the bill of lading or shipping contract, and impose the duty on the shipper, if the latter agrees to the provision in the shipping contract.

Same—Shipping Contract.—In the absence of statute or provision in the bill of lading or shipping contract, the common-law rule as to the duty to care for live stock in transportation is imported into and becomes a part of the contract.

Same—Injuries to Passenger—Evidence.—In an action for injuries to a person accompanying a shipment of poultry, evidence held not to show a usage whereby the plaintiff had accompanied such shipments without any provision therefor in the bill of lading, but that the right had been given by the bill of lading on former occasions.

Same—Who Are Passengers—Agents Accompanying Shipments.†—Where the agent of a carrier was told on making out the bill of lading that there was no one to accompany the shipment, and the bill was

*See foot-note appended to *Boston & M. R. R. Co. v. Sargent* (N. H.), 12 R. R. R. 459, 35 Am. & Eng. R. Cas., N. S., 459; first foot-note appended to *St. Louis S. W. Ry. Co. v. Butler* (Ark.), 27 R. R. R. 606, 50 Am. & Eng. R. Cas., N. S., 606; *Frazier v. Charleston & W. C. Ry. Co. (S. Car.)*, 19 R. R. R. 768, 42 Am. & Eng. R. Cas., N. S., 768.

†For the authorities in this series on the question whether the em-

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made out without provision for any one to accompany it, an agent of the shipper who had previously accompanied shipments under a provision of the bills of lading was not entitled to be in the car as a passenger.

Same—Pleading—Issues and Proof.—Under Civ. Code, § 132 (Burns' Ann. St. 1901, § 396; Thornton's Civ. Code, § 168), providing that, where the allegation of the claim to which proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, but a failure to prove, proof that the agent of a shipper had frequently accompanied shipments under a provision of bill of lading did not support an allegation of a usage permitting him to accompany shipments under bills of lading containing no such provision.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Newton J. Hostetter against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, affirmed by the Appellate Court (82 N. E. 1134), defendant appeals. Reversed, with instructions to grant a new trial.

E. C. Field, H. R. Kurrie, and Thomas & Foley, for appellant.
U. C. Stover and Crane & McCabe, for appellee.

JORDAN, J. Appellee sued in the trial court to recover for personal injuries attributed to the alleged negligence of appellant's servants. The complaint consists of two paragraphs, to each of which appellant unsuccessfully demurred for want of sufficient facts to constitute a cause of action. An answer in five paragraphs was filed, the first of which was the general denial. A demurrer by appellee was sustained to the second and fifth paragraphs of this answer. Reply, the general denial; trial by jury; verdict in favor of appellee for \$7,000. Along with this general verdict answers were returned by the jury to a number of interrogatories. Appellant unsuccessfully moved for judgment in its favor upon these findings. It also moved for a new trial, which motion was denied, and judgment was rendered upon the verdict of the jury. The errors of the Montgomery circuit court assigned in the appeal to the Appellate Court are, first, overruling the demurrer to each paragraph of the complaint; second, overruling the motion for judgment on the interrogatories;

ployees of others. while being transported by a railroad company, are the passengers of the latter, see foot-note appended to *Clough v. Grand Trunk Ry. Co.* (C. C. A.), 26 R. R. R. 60, 49 Am. & Eng. R. Cas., N. S., 660, where all those preceding are collected; foot-note appended to *Chicago, etc., Ry. Co. v. O'Brien* (C. C. A.), 27 R. R. R. 234, 50 Am. & Eng. R. Cas., N. S., 234; *Southern Ry. Co. v. Cullen* (Ill.), 24 R. R. R. 195, 47 Am. & Eng. R. Cas., N. S., 195; *Davis v. Chesapeake & O. Ry. Co.* (Ky.), 24 R. R. R. 170, 47 Am. & Eng. R. Cas., N. S., 170.

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third, overruling the motion for a new trial. Proper errors are assigned in the appeal taken from the Appellate to the Supreme Court.

We state or set out so much of the first paragraph of the complaint which, as appellee asserts, shows or establishes that at the time he sustained the injuries of which he complains the relation of carrier and passenger existed between him and appellant railroad company. The paragraph alleges: That "the defendant is now and for several years last past has been a railway company incorporated under the laws of the state of Indiana, and during such time has owned and operated a railway as a common carrier of passengers and freight for hire between Chicago, Ill., and Louisville, Ky., through Montgomery and other counties in Indiana. That for six years prior to and throughout the month of January, 1902, plaintiff was in the employ of Havens Bros., a firm of poultry dealers, who resided and had their principal place of business in the town of Ladoga, in Montgomery county and state of Indiana, and for such firm he had charge of the care and shipment of live poultry which said firm shipped in car load lots from various stations on defendant's railway to New York and Eastern markets. That during all said time it was and continued to be the usage and custom of the said Havens Bros. and of the defendant, and it was and continued to be necessary, in the shipment of said live poultry over defendant's said road, to have a man accompany each car load, in charge thereof, to feed, water, watch, protect, and care for the same en route, and it was necessary and proper for the care of said poultry to take along therewith and in the same car a large supply of food and water for said poultry, and constantly to guard and watch and feed and water the same, and to protect the same from theft and injury, and said poultry cars were so arranged as to afford space and room for feed and water, and for the attendant in charge thereof. And it was during all of said time the usage and custom of said Havens Bros. and of said defendant, and it was necessary and proper, to have said man in charge occupy and ride in the car with said poultry, and during all said time this plaintiff was and continued to be the man so employed by said Havens Bros. and carried by the defendant as the man in charge of said shipments of live poultry, and according to said usage and custom this plaintiff did during all said time accompany said shipments and ride in the car with said poultry, which he did with the knowledge and consent of the defendant. That during all of said time the plaintiff accompanied more than 240 car loads of poultry, one car load at a time, more than half of the same over defendant's said railroad, and rode in the car therewith each time, with the knowledge and consent of the defendant. That at no time during all said years did the defendant give to the plaintiff any notice whatever that he should not ride in the poultry car

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with the poultry so shipped and in his charge, but at all times consented thereto. That during all said time it was the usage and custom of said defendant and of said Havens Bros., in making up any car load of poultry intended for shipment to said Eastern markets as aforesaid, to partially load said car with poultry at Gosport, or some other station on defendant's said road south of said Ladoga, and to make out bill of lading as for a full load, making a memorandum on such bill of lading directing that additional poultry should be loaded in said car en route at any station named and such car should be set off at Ladoga to finish loading the same, and to set such car off at said Ladoga pursuant to such memorandum and directions for the completion of such load, and thereupon to complete such load at said Ladoga, and it was the usage and custom of the defendant during all said time when notified that any such car load was so completed at said Ladoga to cause the first available freight train and freight train crew passing northward through said Ladoga over its said road to pick up said car so loaded, with this plaintiff in charge, and in said car with said live poultry, and attach the same to the forward end of said freight train next to the locomotive, and carry the same over defendant's said road to Crawfordsville Junction in said county, and there leave the same to be picked up and carried forward toward its destination by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, whose railway connects with defendant's said road at said Crawfordsville Junction.

* * * The plaintiff avers that on January 31, 1902, pursuant to the usages and customs aforesaid, which heretofore and then existed between the defendant and said Havens Bros. as aforesaid, the defendant at the request of said Havens Bros. furnished a certain kind of a freight car known as a poultry car on its tracks at its station in Gosport, in Owen county, Ind., where the same was to be partially loaded with live poultry and forwarded thence on defendant's said road, with directions to stop the same in the train at said Cloverdale Station and load poultry thereon, and to set said car off at said Ladoga, where the same was to be further loaded to completion with live poultry and forwarded thence to Crawfordsville, to be there billed through to its destination in New York City over said Cleveland, Cincinnati, Chicago & St. Louis Railway, all of which the defendant well knew and understood. That on said 31st day of January, 1902, the defendant caused its agent at said Gosport Station, pursuant to the usages and customs aforesaid, to issue its duplicate bills of lading for said car so loaded and to be loaded as aforesaid, which bill of lading is in the words and figures following, to wit: (Here the bill of lading is incorporated into and made a part of the complaint)—and delivered the same to said Havens Bros., and that the defendant wholly failed to cause any indorsement to be made thereon in the nature of a pass or otherwise to give this plaintiff

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or said Havens Bros., or any one else for him or them, any other evidence of his (plaintiff's) right, or of the right of any one whatsoever, to be carried or transported over defendant's said road as the man in charge of said poultry, so to be shipped in said car, than said bill of lading, and the defendant well knew that said Havens Bros. and this plaintiff understood, and had by defendant been given to understand, that such bill of lading should be accepted and treated by the defendant and its agents, servants, and employees as full and ample authority for, and evidence of the right of, this plaintiff, as the man in charge of such shipment of poultry, to be carried therewith in consideration of the payment of the freight charges fixed and provided in the official freight classification and tariffs of freight rates promulgated, published, and in force as hereinafter alleged and set forth. That at said time and for several years prior thereto there were in full force and effect on defendant's said railroad and on all connecting lines of railroad over which said Havens Bros. made shipments of live poultry as aforesaid certain official freight classifications and tariffs of freight rates chargeable, which classifications and tariffs were duly published and promulgated, and formed the basis of all contracts for shipment of freight made by and between said Havens Bros. and said defendant during all said time in which they were engaged in making said shipments, and that said freight classifications and tariffs provided that the freight rates chargeable thereunder were for such shipments with a man in charge thereof. That said poultry car was pursuant to said arrangements, and in conformity to the usages and customs aforesaid, partly loaded with live poultry at said Gosport and en route at Cloverdale, and left on the side track at said Ladoga Station for completion of the load, and on said day said load was completed at Ladoga, and said car was made ready for shipment, and defendant was duly notified thereof. That for said shipment of said car load of poultry so loaded at Cloverdale and Ladoga as aforesaid to its destination in the city of New York the defendant charged the regular tariff rate of freight as published and in force on defendant's road for that class of property as aforesaid, which included transportation of a man in charge, and said Havens Bros. paid said rate therefor. That at about — o'clock p. m. on said 31st day of January, 1902, said car load of live poultry so partly loaded at Gosport and Cloverdale as aforesaid was standing on the side track at said station of Ladoga, loaded with said live poultry in coops, and with a large supply of feed and water for the same, ready and waiting to be picked up and carried forward on defendant's said road, according to said bill of lading and said usages and custom. That at said time it was very dark, and there was ice and snow on the ground and along defendant's track. That this plaintiff then and there held said bill of lading, and was ready and waiting to go with said poultry as the man in charge,

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but that he did not know and had no means of knowing what train would pick up said car until the same came in, and, having orders so to do, attached the locomotive thereto, and after seeing that done the plaintiff would not have had time or opportunity to reach such train and get aboard the same otherwise than by getting into said poultry car. That while so waiting on said night one of defendant's freight trains, drawn by a locomotive engine, coming from the south, stopped at a point south of said bridge and about 100 rods south of said Ladoga Station, and, having disconnected the locomotive therefrom, defendant, by its servants, left said train standing on the track and ran said locomotive down to said poultry car, and, attaching the locomotive thereto, pushed said car back to said train so standing on the track south of said bridge. That when the plaintiff saw that the locomotive was about to pick up said car and connect same with said train, he entered said car with the knowledge and consent of the defendant, and remained therein until after the happening of the injuries hereinafter complained of. * * * That when the plaintiff entered said poultry car he, as the agent of said Havens Bros., consignors, and as the caretaker and man in charge, had in his possession said bill of lading, issued as aforesaid, by said defendant's station agent at Gosport, which had been delivered to him by said Havens Bros., as his evidence of his right to transportation as such caretaker or man in charge of said poultry, and he was then and there a passenger for hire, and entitled to protection as such at the hands of the defendant." Here follow averments going to show the negligence of appellant's servants in uncoupling and leaving said poultry car on the track in the darkness of the night without leaving any one in charge thereof, and without placing a signal light to indicate to the engineer the presence of said car, on account of which negligence the locomotive collided with said poultry car in which plaintiff was in charge of the poultry, which collision resulted in the injuries of which he complains. "That at no time during all said time did the defendant ever issue to the plaintiff in charge of said shipments of poultry any pass, but sometimes an indorsement or memorandum was made on the bill of lading, in substance, 'Pass man in charge,' or 'Pass one in charge,' but during said time it was the general usage and habit of the defendant to issue a bill of lading for each car load of poultry so shipped by said Havens Bros. over defendant's said road, without any such indorsement or memorandum thereon, and to deliver the same to said Havens Bros., to be by them delivered to the plaintiff as the man in charge, and to carry the plaintiff in such poultry car as the man in charge, without other evidence of his right to ride in such car or be carried on such train with the poultry other than such bill of lading, and defendant, never at any time, notified this plaintiff that such usage and habit would be discontinued, or that this plaintiff should

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not take passage on and in any such car of poultry, to be transported and carried therein as the man in charge. * * * That said car was especially built for a poultry car, and was used by defendant in the business as a common carrier. Plaintiff further avers that the coops in said car were securely built into said car, and were securely fastened by heavy braces and iron clamps in the usual method of loading said poultry car, and said car at such time and place was a safe and secure place for plaintiff to ride in said freight train, and in the ordinary and usual operation of a freight train such a poultry car so loaded is a safe and secure place for a caretaker and man in charge of said car to ride in in caring for said poultry; that the defendant, as a common carrier, would not and did not assume any responsibility whatever with respect to the feeding, watering, guarding, protecting, or watching said poultry, but provided such poultry cars so arranged as to accommodate necessary feed and water for such poultry and suitable space for a caretaker or man in charge to occupy and ride in such car, and permitted and expected the consignor to furnish and send such caretaker or man in charge, and as an inducement so to do provided in its said freight classification and tariff or rates that such caretaker or man in charge would be carried without charge other than the freight rate chargeable for the carriage of said poultry."

The bill of lading set forth and made a part of the complaint issued by appellant's freight agent at Gosport, Ind., to Havens Bros., the shipper, is in part as follows: "Bill of Lading, No. 91. Gosport, 1-31-1902. Received from Havens Bros. by the Chicago, Indianapolis & Louisville Railway Company the property described below in apparent good order, * * * consigned and destined as indicated below, which said company agrees to carry to the said destination if on its road; otherwise to deliver to another carrier on the route to said destination. It is mutually agreed in consideration of the rate of freight hereinafter named as to each carrier, on all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all conditions, whether printed or written, indorsed hereon, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable." Here follow numerous conditions upon which the bill of lading declares the property is received for transportation by the Chicago, Indianapolis & Louisville Railway Company. Among these conditions are the following: "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control or by floods, etc. The owner or consignee shall pay the freight at the rate hereon stated, and all other charges accruing on said property before delivery," etc.

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This bill of lading is entirely silent in respect to the shipper assuming the care and feeding of said poultry during its transportation, or that a man is to be sent as a caretaker thereof, or as to any direction to pass any one in charge of said poultry. There is nothing in said bill of lading in any manner stipulating that appellant was to be relieved of caring for, feeding, and watering said poultry during the transportation thereof.

The second paragraph charges that the defendant is a common carrier, etc.; that it is engaged in operating a railway as a common carrier of passengers and freight through Montgomery and other counties of the state of Indiana; that on January 31, 1902, the defendant received for pay a sum of money, in consideration whereof it agreed to carry plaintiff as a person in charge of a car load of poultry then in a freight car as a passenger in said freight car on said day at the station of Ladoga. It is alleged that plaintiff entered said car as a passenger for hire, and took charge of said poultry, and afterwards, while so in said car and in charge of said poultry, on said day and at said station of Ladoga, the defendant, through its agents and servants, so carelessly and negligently operated the engine on said train that said engine was carelessly and negligently run into and collided with the car in which plaintiff was riding, and he was thereby thrown down in said car and injured, as therein stated; that he was injured without any fault or negligence on his part, but wholly through the fault of defendant in the operation and management of said engine and train in which plaintiff was riding, by reason whereof plaintiff has been damaged, and demands judgment in the sum of \$15,000.

Under the averments of the first paragraph of the complaint the pleader seeks to show that the relation of passenger and carrier at the time appellee was injured existed between the latter and appellant company. While the bill of lading issued by the railroad company to Havens Bros., the shipper of the poultry in question, is set out and made a part of this paragraph, nevertheless it is apparent that appellee does not base his right of action upon this contract. The action sounds in tort, and is predicated upon the violation by appellant of a duty which, under the law, as a carrier of passengers for hire, it owed to appellee. It is evident that the only purpose of the pleader in making the bill of lading a part of the paragraph was to aid or support the averments thereof in disclosing that appellee, at the time of the accident by which he was injured, was a passenger for hire, and entitled under the law to the protection as a passenger. *Pittsburg, etc., R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Lake Shore, etc., R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425; *Flint, etc., Co. v. Beckett*, 167 Ind. 491, 79 N. E. 503. Briefly stated, it may be said that the contention of appellant's counsel is that the facts as alleged in

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the first paragraph of the complaint are not sufficient to establish that appellee, at the time he was injured through the alleged negligence of appellant's servants, was a passenger, and as such entitled to be accorded protection which the law exacts; that inasmuch as his right to be transported along with the poultry shipped by the firm of Havens Bros. was not in any manner provided for in the bill of lading set out and made a part of the pleading, he was not, therefore, rightfully upon appellant's freight train as a passenger; and that the railroad company owed him no duty as such.

It is argued that all oral agreements or understandings leading up to the issuing of the bill of lading must be considered and held to be merged therein, and that the bill of lading cannot be contradicted or modified thereby. On the other hand, counsel for appellee, while conceding that the bill of lading itself does not show that the shipper had assumed the responsibility of caring for the poultry while en route, nevertheless they insist that the bill or shipping contract must be read in the light of the usage or custom set out in the pleading, and the fact that appellee had been in the previous shipments transported by appellant as a caretaker of the poultry shipped by Havens Bros., without any stipulation or provision in the bills of lading to that effect, it must be considered or held in this case that the real understanding between the railroad company and said firm of Havens Bros., the shipper, was that the latter was to assume the duty of caring for the poultry, and that appellee, as the employee of the shipper, should, upon the occasion in question, accompany the poultry as a caretaker, as he previously had done, and be given transportation in consideration of the freight paid by his employer to appellant company. It is manifest, in view of the allegations of the first paragraph of the complaint and instructions given by the lower court to the jury, that the case was tried and submitted upon the theory that if appellant company, as a common carrier of freight, and Havens Bros., as the shipper of the poultry, had dealt with each other in the shipment in question in respect to the previous usage or custom as alleged in the complaint, then such usage would form a part of the bill of lading issued for the shipment of the poultry in the case at bar, unless appellant had given notice to Havens Bros. that such usage would be no longer continued. Under the common law, in the shipment of live stock by a common carrier, the duty to give it necessary care and attention during its transportation devolves upon the carrier, and not upon the shipper. The carrier, however, may, to an extent at least, absolve himself or itself from this duty or responsibility by a provision in the bill of lading or shipping contract to that effect; and thereby impose such duty or responsibility upon the shipper, provided the latter can be said to agree to such provision in the shipping contract. *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 31

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N. E. 787, 17 L. R. A. 339, 32 Am. St. Rep. 239; Lake Erie, etc., R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Lake Shore, etc., R. Co. v. Teeters, *supra*; 5 Am. & Eng. Ency. of Law (2d Ed.) §§ 436, 439; Hutchinson on Carriers (3d Ed.) § 634.

As a general rule the consideration for the assumption of the duty by the shipper to care for live stock in transit is the reduction in the shipping rate by the carrier or the transportation of a caretaker furnished by the shipper to accompany the stock. Hutchinson on Carriers (3d Ed.) § 640. In the absence of a statutory provision or anything in the bill of lading or shipping contract to the contrary, this rule or provision of the common law is imported into and becomes a part of the bill of lading or shipping contract. As in other contracts the law always constitutes an important element in every bill of lading or shipping contract, and where such bill as the one herein is silent in respect to the duty of caring for live stock while in transit, the common law relative thereto is imported into the bill and becomes a provision therein in like manner as though it had been expressly stipulated in the contract that such duty should devolve upon the carrier. 4 Elliott on Railroads (2d Ed.) § 1423; Snow v. Indiana, etc., R. Co., 109 Ind. 422, 9 N. E. 702; Louisville, etc., R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244; Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586.

Conceding, as we may, without deciding, that the first paragraph of the complaint is sufficient to state a right of action in favor of appellee, or, in other words, that the usage, as alleged in the pleading, by which Havens Bros. and appellant were controlled in the shipment of poultry prior to the happening of the injury of which appellee complains entered into and formed a part of the bill of lading in question, and thereby the duty to care for the poultry in controversy was assumed by Havens Bros., the shipper, and therefore they were authorized to place appellee, their employee, in the car in which the poultry was shipped, as a caretaker, and hence he was upon said car as a passenger for hire, we pass to the consideration of the evidence, and the special findings of the jury in answer to certain interrogatories.

By the answers to the interrogatories it is fully disclosed that the general verdict of the jury is based upon the first paragraph of the complaint, and unless it can be said that the facts proved by the evidence sustain the cause of action alleged in that paragraph the appellee is not entitled to a recovery in this action. The undisputed evidence in the case, as well as the special finding of the jury in answer to interrogatories, establish that prior to the time that appellee was injured, as alleged in the complaint, Havens Bros., his employer, had made numerous shipments of poultry over appellant's railroad. The car containing the poultry was generally partially loaded and billed from Gosport, Ind.,

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and permission was given by appellant company for this car to be left at other points upon its road between Gosport and Ladoga for the purpose of taking on additional poultry. The car would then be taken to Ladoga, and from there over appellant's road to Crawfordsville Junction, and at that point turned over to the Big Four Railroad Company for transportation on to New York City. The bill of lading incorporated in the first paragraph of the complaint and in evidence in this case was made out by appellant's shipping agent at Gosport, Owen county, Ind., and there delivered to the agent or representative of Havens Bros. At the time the poultry was billed appellant's agent at Gosport, before making out the bill of lading, inquired of Havens Bros.' agent "if there was any one with the car," and was informed that there was not. The bill of lading was thereupon issued and delivered to the representative or agent of said shipper, without making any provision therein for the transportation of appellee or any one to accompany the poultry in transit. The poultry car upon which appellee was at the time he sustained the injuries of which he complains, was partially loaded with poultry at Gosport on January 31, 1902, at the time the bill of lading in controversy was issued. This car, after being partially loaded at that station, was run to Cloverdale, a station on appellant's road, where additional poultry was taken aboard. It was then run to Ladoga, and left there for the purpose of completing the loading of the poultry. At the latter station appellee, an employee of Havens Bros., the shipper, went aboard of this car for the purpose of exercising the duties of a caretaker in respect to the poultry. When he boarded the car he had in his possession the bill of lading which had been delivered to him by said shipper. It appears that no one was in charge of the car as a caretaker of the poultry between Gosport and Ladoga. This car was handled and moved by appellant company between Gosport and Ladoga under the bill of lading made out by appellant's agent at Gosport.

The evidence establishes, and the jury specially find, that no other additional or different contract was made by the defendant in respect to the movement of said poultry car over any part of its said line except the bill of lading in question. The jury also finds that when the bill of lading was issued by the defendant's agent, as hereinbefore stated, said agent was advised by the agent of Havens Bros. that there was no man in charge of the car, and no request was made for provision to be made in the contract for Havens Bros., the shipper, to send a man in charge of the poultry. In contracting for all the shipments of poultry made by said firm of Havens Bros. in 1901 it was provided in the shipping contracts that a man would be passed in charge of said poultry, and in this manner said firm specially contracted with appellant for the free passage of a man who was to be in charge of the poultry and have the care thereof. During the period covered by the

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shipments of poultry over appellant's railway prior to the time of appellee's injury about 240 shipments were made. All the bills of lading issued in these shipments contained a provision which read, "Pass man in charge," except about two, which read, "Pass Newt. Hostetter" (being appellee herein), or "Pass N. Hostetter."

Appellee, in these shipments, was the man placed in charge of the poultry by Havens Bros., and his duties were to feed, water, and care for the poultry in transit. In fact, the evidence fully establishes that the authority or right of appellee to accompany the poultry as an employee of said firm of Havens Bros. in all of the previous shipments made by it over appellant's road was provided for in the bill of lading or shipping contract entered into between said firm and appellant company, and in no manner did appellee's right to transportation as a caretaker of the poultry in the previous shipments arise out of or depend upon the usage or custom alleged in the first paragraph of the complaint. It is manifest by the facts proven by the evidence in this case that appellee's cause of action, as alleged in the first paragraph of his complaint, in its general scope and meaning, stands unproved. The facts as proven present a case materially different from that disclosed by the facts averred in the complaint. The facts proven, when tested by the authorities hereinbefore referred to, wholly fail to sustain appellee's right to be in the car in charge of the poultry at the time he was injured. In truth, the facts as proven are clearly outside of those alleged in the complaint to establish appellee's right to be in the car in charge or care of the poultry at the time he was injured. The rule is firmly settled that the plaintiff must recover, if at all, upon the allegations of his complaint. Section 132 of our Civil Code (section 396, Burns' Ann. St. 1901; section 168 Thornton's Civ Code) provides that, "where the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, * * * but a failure to prove." See *Jeffersonville, etc., R. Co. v. Worland*, 50 Ind. 339; *City of Huntington v. Mendenhall*, 73 Ind. 460; *Thomas v. Dale*, 86 Ind. 435; *Cleveland, etc., R. Co. v. Wynant* 100 Ind. 160; *Cincinnati, etc., R. Co. v. McLain*, 148 Ind. 188, 44 N. E. 306. At the time appellee boarded the poultry car at Ladoga he was certainly admonished by the character of the car that it was not intended for transportation of passengers. He knew that his right to accompany the poultry and be transported as a caretaker depended upon the contract between his employer, Havens Bros., and the railroad company. When he boarded the car he had in his possession the bill of lading. An inspection thereof would have fully disclosed that no provision whatever therein was made for his transportation by appellant, or to authorize him as the employee of the shipper to accompany the poultry. While it is true,

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as insisted by his counsel, he was not a party to this contract, nevertheless, so far as he bases any right thereon to be carried by appellant as a passenger, he is bound by all its express and implied provisions affecting such right. He had no greater or better claim to be carried by appellant over its road as a caretaker of the poultry than had his employer. As previously stated, whatever right he had in this respect depended upon the contract which Havens Bros. had with appellant company. *Cleveland, etc., R. Co. v. Henry* (at this term) 83 N. E. 710.

There being a failure of proof to sustain material facts as alleged in the first paragraph of the complaint, appellee, therefore, was not entitled to a recovery thereon. It follows that the trial court erred in denying the motion for a new trial.

Judgment reversed, with instructions to grant appellant a new trial.

McFEAT v. PHILADELPHIA, W. & B. R. Co.

(Supreme Court of Delaware, Jan. 21, 1908.)

[69 Atl. Rep. 744.]

Carriers—Carriage of Passengers—Personal Injuries—Actions for Injuries—Admissibility of Evidence.—In an action against a carrier for death caused by being hit by a train approaching on one track, and which the deceased was awaiting, and thrown under the running board of a shifter moving slowly on a parallel track, there being between the tracks but a few feet of planking, upon which passengers were accustomed to wait for trains, the court properly refused to allow a witness to answer the question whether such planking or platform was an unusually unsafe crossing for persons to use and wait upon for north-bound trains; such question being clearly improper and irrelevant, because it implied that such planking had been provided by defendant as a place for passengers to wait for north-bound trains, for which implication there was no warrant in the evidence.

Same.—In such an action the court properly refused to allow a witness to be asked whether he had seen the shifter and those awaiting trains at any other position than they were on that day; the question being irrelevant.

Trial—Remarks of Judge.—In an action for death against a carrier, the court, in denying a nonsuit, said: "We have considered the motion for a nonsuit in this case, and, while we have very grave doubt of the plaintiff's right to recover upon the evidence presented, we think the case should go to the jury." Held, that Const. art. 4, § 22, which provides that "judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law," has no application to the court's remarks, because, though made in the jury's presence, they were not addressed to the jury.

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Same—There is no ground for the contention that the court's remarks in denying a nonsuit tended to influence the minds of the jury against plaintiff's right to recover upon the evidence presented by him, where the court, after making such remarks, instructed the jury that the court has nothing to do with the facts or evidence in the case, that the jury were the sole judges of the effect and weight of the testimony, and that, having heard all the evidence, it was the jury's duty to carefully consider it, applying thereto the law declared by the court.

Carriers—Who Are Passengers.*—In order to be a passenger it is not necessary to have a ticket, or to be actually upon defendant's train; but if there is a bona fide intention by one injured, at the time of the accident, to board defendant's train, and if defendant had knowledge of that fact, or if the acts and conduct of the injured party and the other circumstances were such as to reasonably notify defendant that he intended to board the train, he is entitled to such care and protection from defendant as is required where the relation of passenger and carrier exists.

Trial—Instructions Already Given.—In an action against a carrier for death caused by being hit by a train approaching on one track, and which the deceased was awaiting, and thrown under the running board of a shifter moving slowly on a parallel track, there being but a few feet of planking between the tracks, the court's failure to charge that, where the arrangement of a station is such that a passenger has to cross a track either before entering or leaving the cars, he has a right to assume that the track may be crossed safely, and the railway is liable if he be struck by a train moving on that track when he is approaching the cars or station, was not erroneous, where the court did charge that, when the arrangement of the station is such that a

*For the authorities in this series on the question whether a person may be a passenger before he boards a train or street car of the carrier, see foot-note appended to *Gregg v. Northern Pac. Ry. Co.* (Wash.), 28 R. R. R. 519, 51 Am. & Eng. R. Cas., N. S., 519; *Hogner v. Boston Elec. Ry. Co.* (Mass.), 28 R. R. R. 756, 51 Am. & Eng. R. Cas., N. S., 756; *Illinois Cent. R. Co. v. Cotter* (Ky.), 27 R. R. R. 141, 50 Am. & Eng. R. Cas., N. S., 141; foot-notes appended to *Karr v. Milwaukee, etc., Traction Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623, where all those preceding them are collected.

For the authorities in this series on the subject of the existence of the relation of carrier and passenger as affected by the failure to purchase a ticket or pay fare, see first foot-note appended to *Louisville & N. R. Co. v. Cotengim* (Ky.), 25 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659; *Dougherty v. Chicago, etc., Ry. Co.* (Iowa), 28 R. R. R. 558, 51 Am. & Eng. R. Cas., N. S., 558.

For the authorities in this series on the subject of contributory negligence of and assignment of risk by a person, other than a railroad employee, in voluntarily exposing himself to a known danger, see foot-note appended to *Stevenson v. Pittsburg, etc., Ry. Co.* (Pa.), 28 R. R. R. 325, 51 Am. & Eng. R. Cas., N. S., 325; last foot-note appended to *Harris v. Southern Ry. Co.* (Ga.), 27 R. R. R. 508, 50 Am. & Eng. R. Cas., N. S., 508; first foot-note appended to *State v. Western Md. R. Co.* (Md.), 26 R. R. R. 196, 49 Am. & Eng. R. Cas., N. S., 196.

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passenger has to cross the track either before entering or after leaving the cars, he has a right to assume that the track may be crossed safely, provided he crosses the track at a proper and reasonable time, and is not struck because of his own negligence, and that the tracks of a railroad company over which frequent trains are passing is a place of danger, and neither a passenger nor other person has a right to go upon them at an improper or unreasonable time; the charge given being a better statement of the law applicable to the case.

Negligence—Contributory Negligence—Choice of Alternative Involving Risk.†—While a person should not be held guilty of contributory negligence who, in the effort to avoid immediate danger in the exigency of the moment, suddenly and without time or opportunity for reflection, puts himself in the way of other peril without fault on his part, and particularly so if the defendant has placed the person in such position, yet no one has a right to needlessly place himself in a place of danger, and, if a person failing to observe due care walks into a danger that the observance of due care would have enabled him to avoid, he is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger, but fails to make any effort for his personal safety, and because thereof is injured.

Same—Acts Constituting Negligence—Unavoidable Accident.‡—A pure accident, without negligence on the part of defendant, is not actionable, but would come under the head of unavoidable accident, for which the plaintiff could not recover.

Railroads—Operation—Accidents at Crossing—Duty to Stop, Look, and Listen.§—One approaching a railroad crossing is bound to know that it is a place of danger, and he must give that attention to the sights and sounds of warning of an approaching train, if any there are, that a man of ordinary caution under like circumstances would give.

†See last foot-note appended to *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 27 R. R. R. 500, 50 Am. & Eng. R. Cas., N. S., 500; last foot-note appended to *McCallion Pac. Ry. Co.* (Kan.), 26 R. R. R. 178, 49 Am. & Eng. R. Cas., N. S., 178; foot-note appended to *Maysville, etc., R. Co. v. McCabe's Adm'x* (Ky.), 26 R. R. R. 107, 49 Am. & Eng. R. Cas., N. S., 107; foot-note appended to *Chicago, etc., R. Co. v. Lilley* (Neb.), 7 R. R. R. 798, 30 Am. & Eng. R. Cas., N. S., 798, where all those preceding it are collected.

‡For definitions of what does, and does not, constitute actionable negligence, see first foot-note appended to *Chicago Union Traction Co. v. Giese* (Ill.), 27 R. R. R. 195, 50 Am. & Eng. R. Cas., N. S., 195; foot-notes appended to *Teakle v. San Pedro, etc., R. Co.* (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18; first foot-note appended to *Crowe v. Michigan Cent. R. Co.* (Mich.), 24 R. R. R. 191, 47 Am. & Eng. R. Cas., N. S., 191; second foot-note appended to *Hardt v. Chicago, etc., Ry. Co.* (Wis.), 26 R. R. R. 468, 49 Am. & Eng. R. Cas., N. S., 468.

§See second foot-note appended to *Southern Ry. Co. v. Hansborough's Adm'x* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1; first foot-note appended to *Chesapeake & O. Ry. Co. v. Wilson's*

McFeat v. Philadelphia, etc., R. Co

Appeal from Superior Court, New Castle County.

Action by Alexander L. McFeat, administrator of Walter McFeat, against the Philadelphia, Wilmington & Baltimore Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and GRUBB, JJ.

Levin F. Mclson and *Horace G. Knowles*, for plaintiff in error.

Herbert H. Ward and *Andrew C. Gray* for defendant in error.

SPRUANCE, J. This action was brought to recover damages for the death of Walter McFeat, alleged to have been caused by the negligence of the defendant company. On May 26, 1902, the defendant owned and operated a railroad through the city of Wilmington, with a station at French street. In front and at the side of the station there was a cement sidewalk from 28 to 35 feet wide. Beyond this sidewalk there were three tracks; the first being the spur track, the second the south-bound track, and the third the north-bound track. Between these tracks there was planking. The distance between the south-bound track and the north-bound track was 6 feet. On the day mentioned the said Walter McFeat went to said station for the purpose, as the plaintiff alleges, of taking the 1:37 north-bound train. Before the arrival of said train McFeat went from said sidewalk, across the said first and second tracks, toward said third track, on which said train was approaching. Before the arrival of the said train, a shifter, which had been standing on the south-bound track some distance from McFeat, was moving slowly down along the station; its bell ringing. On the approach of the shifter McFeat did not, as did the other persons who had started for said train, move back to the sidewalk; but he remained near the north-bound track, and was struck by said train and thrown under the running board of the shifter. The shifter was immediately stopped and backed, and McFeat was taken out. From his injuries so received he died the same day.

The plaintiff's allegations of negligence on the part of the defendant were failure to provide safe platforms, failure to give proper warning of the movement of its trains, negligent operation of its trains, excessive speed of said north-bound train, and backing the shifter while McFeat was under its running board. The defendant denies that it was guilty of any negligence which re-

Adm's (Ky.), 27 R. R. R. 238, 50 Am. & Eng. R. Cas., N. S., 238; third foot-note appended to *Louisville & N. R. Co. v. Taylor's Adm'r* (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228; last foot-note appended to *Seaboard A. L. R. v. Smith* (Fla.), 25 R. R. R. 793, 48 Am. & Eng. R. Cas., N. S., 793; *Choctaw, etc., R. Co. v. Baskins* (Ark.), 25 R. R. R. 431, 48 Am. & Eng. R. Cas., N. S., 431; *Mankewiez v. Lehigh Valley R. Co.* (Pa.), 25 R. R. R. 509, 48 Am. & Eng. R. Cas., N. S., 509; first foot-note appended to *Osteen v. Southern Ry.* (S. Car.), 25 R. R. R. 300, 48 Am. & Eng. R. Cas., N. S., 300.

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sulted in the death of McFeat, and insists that, if there was any negligence on its part, the negligence of McFeat in recklessly and unnecessarily placing himself in a place of great peril is a bar to the plaintiff's recovery in this action. A motion for a nonsuit having been refused, after hearing the defendant's testimony, the arguments of counsel, and the charge of the court, the jury rendered a verdict for the defendant. The plaintiff has filed 15 assignments of error. Of these the third, ninth, and tenth have been abandoned.

The first assignment of error relates to the refusal of the court to allow a question to a witness as to whether "the platform and passageway or crossing" was, or not, in his judgment, an unusually unsafe crossing for persons to use and wait upon for north-bound trains. Without expressing any opinion as to whether it was proper, under the circumstances of this case, to put in evidence the judgment of the witness as to the safety of the place in question, viz., the space between said sidewalk and said north-bound track, as a passageway for persons going to and from trains on the north-bound track, the question was clearly improper and irrelevant, because it implied that the space between the sidewalk and the north-bound track had been provided by the defendant as a place for passengers to wait for north-bound trains, for which implication there was no warrant in the evidence.

The second assignment is as to the refusal of the court to allow a witness to be asked whether he had seen "the shifter and those waiting cars at any other position than they were on that day." The ruling of the court, holding the question irrelevant, was correct.

The fourth assignment is as to the following remarks of the trial judge in refusing the motion for a nonsuit: "We have considered the motion for a nonsuit in this case, and while we have very grave doubt of the plaintiff's right to recover upon the evidence presented, we think the case should go to the jury. Therefore we decline to order the nonsuit." While these remarks were made in the presence of the jury, they were not addressed to the jury, and therefore the provision of the Constitution (section 22 of article 4) that "judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law," has no application. The plaintiff contends that this expression by the court of a doubt as to the plaintiff's right to recover upon the evidence presented by him tended to influence the minds of the jury. There might possibly be some ground for this contention had the court omitted to give to the jury proper instructions as to their rights and duties in respect to the evidence and the facts. There was, however, no such omission. In the charge to the jury the court carefully abstained from any expression of opinion as to the facts, and used the following language as to the province of the court and the jury: "We say to you,

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gentlemen, that with the facts or evidence in the case the court have nothing to do. They are for your determination alone. You are the sole judges of the effect and weight of the testimony. You have heard all the evidence and it is now for your careful consideration and determination, applying thereto the law as we shall declare it to you." With this very clear, forcible, and accurate statement of the law it is quite impossible to believe that any reasonable juror could have had any doubt that it was his duty to determine the facts from the evidence, without any regard to what was said by the trial judge in refusing the nonsuit. For these reasons this assignment of error is overruled.

The fifth and eleventh assignments are as to the alleged refusal of the court to charge the jury as prayed by the plaintiff in reference to the question whether McFeat was a passenger and the duty which the defendant owed to him, if he was such. Upon these points the charge of the court was as follows: "The plaintiff claims in certain counts of his declaration that the plaintiff's intestate at the time and place of the accident was a passenger of the defendant company; this, however, being denied by the defendant. It is for you to determine, from the evidence, whether he was such passenger or not. It is not necessary, to constitute him a passenger, that he should have had a ticket, or that he should have been actually upon the train of the defendant. If you believe that it was the bona fide intention of Walter McFeat, at the time of the accident, to board the defendant's train, and that the defendant had knowledge of that fact, or that the acts and conduct of the deceased and the other facts and circumstances were such as to reasonably inform or notify the defendant that he intended to board the train, he was entitled to such care and protection on the part of the defendant as is required under the law where the relation of passenger and carrier exists." This is a full and accurate statement of the law upon the subject, and embraces everything material in the said prayers of the plaintiff.

The sixth assignment is as to the failure of the court to charge, as prayed by the plaintiff, in reference to the duty of the defendant to provide safe means of ingress and egress to and from its trains. While there was no specific charge upon this point, we are of the opinion that the subject was sufficiently covered by those parts of the charge relating to the high degree of care and diligence required of common carriers in respect to their passengers.

The seventh assignment is as to the failure of the court to charge, as prayed by the plaintiff, as follows: "Where the arrangement of a station is such that a passenger has to cross a track either before entering or leaving the cars, he has a right to assume that the track may be crossed safely, and the railway is liable if he be struck by a train moving on that track when he is approaching the cars or station." The charge of the court is a better statement of the law applicable to this case, viz.: "When

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the arrangement of the station is such that a passenger has to cross the track either before entering or after leaving the cars, he has the right to assume that the track may be crossed safely, provided he crosses the track at a proper and reasonable time, and is not struck because of his own negligence. The tracks of a railroad company over which frequent trains are passing is a place of danger, and neither a passenger nor other person has a right to go upon them at an improper or unreasonable time."

The eighth assignment is as to the failure of the court to charge as prayed in relation to the rule of contributory negligence, where the deceased acts erroneously through fright or excitement induced by the defendant's negligence. The rule in such cases is fully and accurately stated in the charge of the court, and need not be here repeated.

The twelfth assignment is disposed of by our remarks upon the seventh assignment.

The remaining assignments are as follows: "(13) That the court erred in charging the jury as follows: 'While a person should not be held guilty of contributory negligence who, in the effort to avoid immediate danger in the exigency of the moment, suddenly and without time or opportunity for reflection, puts himself in the way of other peril without fault on his part, and particularly so if the defendant has placed the person in such position, yet no one has a right to needlessly place himself in a place of danger; and if a person, failing to observe due care, walks into a danger that the observance of due care would have enabled him to avoid, he is no less guilty of contributory negligence than he who, by the observance of due care, could extricate himself from danger, but fails to make any effort for his personal safety, and because thereof is injured.' (14) That the court erred in charging the jury as follows: 'A pure accident, without negligence on the part of the defendant, is not actionable; and if you should believe that it was of such character it would come under the head of unavoidable accident, and the plaintiff could not recover. (15) That the court erred in charging the jury as follows: 'One approaching a railroad crossing is bound to know that it is a place of danger, and he must give that attention to the sights and sounds of warning of an approaching train, if any there are, that a man of ordinary caution under like circumstances would give.' " These portions of the charge correctly state the law, and are in accordance with frequent prior decisions of the courts of this state.

After a careful examination of the record we are satisfied that the law applicable to the case was fully and fairly stated in the charge of the court, and that the evidence was amply sufficient to warrant the jury in finding a verdict for the defendant on the ground that the proximate cause of the death of McFeat was his own negligence.

The judgment below is therefore affirmed.

SOUTHERN RY. CO. *v.* NOWLIN.

(Supreme Court of Alabama, June 30, 1908. Rehearing Denied July 3, 1908.)

[47 So. Rep. 180.]

Carriers—Agents—Authority—Representation as to Best Route.*—

An agent, in an office maintained by a carrier for the purpose, among others, of giving information to intending passengers in reference to routes of travel, was acting within the scope of his authority in representing that a designated route was the best and quickest.

Same—Liability for Misdirection of Passengers.—A carrier, which, on inquiry by an intending passenger, negligently failed to inform her as to the best and quickest route of travel, is liable for any injury proximately resulting, though the passenger did not purchase her ticket until the next day after receiving the information, where she purchased it in reliance thereon, and though she had the opportunity of consulting the official railroad guide as to routes, from which the carrier got its information.

Same—Excessive Damages.—A verdict for \$1,500 for failure by a carrier to inform a passenger as to the best and quickest route was not excessive, where as a result of the misdirection the route taken was slower and less desirable than another route, and she was compelled to make four or five stops and as many changes of cars, in one or two instances traveling on a freight train to make connections, and was two days in making the trip, and compelled to stand for a long time, and was greatly shaken, and, being in poor health, which was communicated to the carrier, was made worse by the trip and put to expense for medicine and medical attention.

Appeal and Error—Assignment of Errors—Sufficiency.—An assignment of error that "the court separately and severally erred in refusing to give each of defendant's requested written charges, numbered, respectively, 1, 2, 6, 7, 8, 8½, 9, and 11," does not comply with rule 1 of Supreme Court Practice (20 South. iv), in that it is too general, and cannot be considered.

Simpson and Anderson, JJ., dissenting in part.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

*For the authorities in this series on the subject of the implied authority of a carrier's freight or ticket agents, see second foot-note appended to *Gulf, etc., Ry. Co. v. Jackson & Edwards* (Tex.), 19 R. R. R. 125, 42 Am. & Eng. R. Cas., N. S., 125, where all those preceding it are collected; foot-note appended to *Albright v. Atchison, etc., Ry. Co.* (Iowa), 28 R. R. R. 340, 51 Am. & Eng. R. Cas., N. S., 340; foot-note appended to *Illinois Cent. R. Co. v. Jennings* (Ill.), 27 R. R. R. 91, 50 Am. & Eng. R. Cas., N. S., 91.

As to whether it is within the scope of employment of the carrier's employees to give information to or instruct passengers, see note, 6 R. R. R. 170, 29 Am. & Eng. R. Cas., N. S., 170.

Southern Ry. Co. v. Nowlin

Action by Josephine Nowlin against the Southern Railway Company for negligent failure to inform her as to the best and quickest route of travel. Judgment for plaintiff for \$1,500, and defendant appeals. Affirmed.

The complaint was in the following language: "Plaintiff claims of defendants \$1,999 as damages, for that heretofore, to wit, on the 16th day of June, 1904, defendant was a common carrier of passengers for hire and reward by means of trains upon railways, and defendant and companies with connecting lines of railway were engaged in the business of common carriers of passengers from Birmingham, Ala., to Lumberton, N. C., and there were two routes over which a passenger could travel by rail from said Birmingham to said Lumberton, over a part of both of which routes defendant operated trains for the carriage of passengers; that at said time defendant maintained in said Birmingham an office for the purpose, among others, of giving information to intending passengers in reference to routes of travel, and plaintiff, not knowing the best and quickest routes of travel from said Birmingham to said Lumberton, and being in delicate health, through her agent, proposing that plaintiff travel from said Birmingham to said Lumberton over one or the other of said routes, over either of which plaintiff would be defendant's passenger at least part of the way, inquired of defendant at its said office in said Birmingham the best and quickest route from said Birmingham to said Lumberton, and in connection with said inquiry informed defendant of the said condition of her health. It therefore became and was defendant's duty to plaintiff to use due diligence to correctly inform plaintiff as to said route; but, notwithstanding said duty, defendant at said office told plaintiff, through her said agent, that the route via Asheville, N. C., was the quickest and best route to said Lumberton, and, acting upon what defendant so told plaintiff, she did purchase a ticket from the common agent of the defendant and other railways for passage over said route via Asheville, a part of the purchase price of which moved to the defendant, and did on, to wit, the 16th day of June, 1904, and the succeeding day, travel over said route, over a part of which route she was carried by defendant its passenger, and over another part or parts by connections of defendant's railway. Plaintiff avers that said route via Asheville, N. C., was not the best and quickest route to said Lumberton from said Birmingham, but was slower and less desirable than another route, to wit, the route via Atlanta, Ga.; and plaintiff avers that as a proximate consequence of going by the said route via Asheville she was greatly delayed in her journey, was required to change cars a great number of times, to wit, four times, was carried by freight train or mixed train a long distance, to wit, 100 miles, was compelled to stand upon her feet for a long time, was greatly shaken by the rough or irregular movements of the

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train, and, being in delicate health, said condition of her health was greatly aggravated, she was made sore and sick, suffered great mental and physical pain, lost much time, her health and physical stamina were greatly and permanently impaired, and she was put to great trouble, inconvenience and expense for medicine, medical attention, care, and nursing in or about her efforts to heal and cure her said wounds and injuries. Plaintiff alleges that she went by the said route via Asheville as aforesaid, and suffered said injuries and damages, by reason and as a proximate consequence of the negligence of the defendant, in this: Defendant negligently misinformed plaintiff, though her agent as aforesaid, that said route via Asheville was the best and quickest route from said Birmingham to said Lumberton." The above is the count as amended.

The following demurrers were filed thereto: "(1) Said count does not state facts sufficient to constitute a cause of action against this defendant. (2) It fails to allege or show that there was a sufficient, or any, consideration that passed from plaintiff to defendant which would make defendant liable in damages, even though the information given was false. (3) Said count fails to allege or show that plaintiff paid any railroad fare to defendant, or that by reason of, or as a consequence of, said representations any contract was entered into between plaintiff and defendant. (4) It fails to sufficiently aver or show that defendant, or its agent or servant, acting within the line or scope of his employment in that behalf, was guilty of negligence proximately causing the injuries complained of, and does not sufficiently show any breach of duty by the defendant or its said agent of which plaintiff can complain."

The evidence for plaintiff tended to show that, the way she was routed by the ticket sold her, she had to make four or five stops and as many changes of cars, in one or two instances taking a freight to make connections, and that she was two days in making the trip, having to stand a part of the time on account of the crowded condition of the train; that when she started on the trip she was in poor physical condition; and that she communicated this fact to the agent from whom she purchased the ticket. The physicians testified that her condition was worse after the trip than before it.

The eighth assignment of error is in the following language: "The court separately and severally erred in refusing to give each of defendant's requested written charges, numbered, respectively, 1, 2, 6, 7, 8, 8½, 9, and 11."

James Weatherly, for appellant.

Bowman, Harsh & Beddow, for appellee.

DOWDELL, J. The complaint contained two counts. The second count was eliminated on charge requested by the defendant,

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appellant here. The first count, after the last amendment, and to which the demurrer of the defendant filed to it before amendment was refiled, was good against any of the grounds stated in the demurrer. The count, as amended, stated a sufficient cause of action. On the facts stated in said count as amended, and which need not be here repeated, the agent giving the alleged information was acting within the scope of his authority, and the plaintiff had the right to rely and act upon the information given by him in purchasing her ticket, and the defendant company would be liable in damages to the plaintiff for injury proximately resulting from the negligence of such agent.

It is unimportant that the plaintiff did not purchase her ticket until the next day after receiving the information, if she purchased it relying upon the information so received. Nor is it of any consequence that the plaintiff had the opportunity of consulting the official railroad guide as to routes and schedules, from which it is urged in argument of appellant's counsel that the agent got his information. In its facts the case before us is very much like the case of *St. Louis Southwestern Ry. Co. v. White*, 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110, in which the law was held by the Supreme Court of Texas to be as we have here ruled.

There was evidence which tended to support each and every allegation in the complaint. The evidence has been carefully considered, and we are not prepared to say that the trial court erred in overruling the motion for a new trial on the ground that the verdict of the jury was excessive.

The eighth assignment of error does not comply with rule 1 of Supreme Court Practice (20 South. iv), in that it is too general. Questions, therefore, sought to be raised by this assignment, are not to be considered. *Williams v. Coosa Mfg. Co.*, 138 Ala. 673, 33 South. 1015; *Ferrell v. City of Opelika*, 144 Ala. 135, 39 South. 249.

Affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur. SIMPSON and ANDERSON, JJ., dissent, being of the opinion that the verdict is excessive and that the motion for a new trial should be granted.

HARRIS *v.* GREAT NORTHERN RY. CO.

(Supreme Court of Washington, June 25, 1908.)

[96 Pac. Rep. 224.]

Carriers—Freight Rates—Limitation of Liability.*—Where the published tariff provides two rates, one with the carrier's ordinary liability, and the other a lesser rate, by reason of liability being limited, and the shipper makes no selection of rate, it is proper for the carrier to elect which rate shall apply, but a bill of lading showing the limited liability must be executed and delivered at the time the carrier accepts the shipment, or promptly mailed in due course of business, before a loss occurs, and the carrier cannot wait until after the goods have been destroyed, and then choose to make a low rate, with a limited liability, apply to the shipment.

On petition for rehearing. Former opinion (93 Pac. 908) modified.

On Rehearing.

PER CURIAM. Since the filing of the opinion in this case, a petition for rehearing has been filed. In the former opinion (93 Pac. 908) we said: "Where two rates are provided, one in contemplation of the ordinary carrier's liability, and the other a less rate, by reason of a limitation of that liability, it would seem, in the absence of an understanding or agreement between the shipper and the transportation company, that the carrier would assume the ordinary liability which rests upon a common carrier of goods, and that the usual rate for carrying said goods would be the one which the law implies. In other words, the lesser rate is only available as a matter of special contract, or where it is intended and understood by the shipper and carrier to apply in a given instance." We think this should be modified, in the light of the decisions of the federal court, to the effect that tariffs of a railway company, published as required by the act of Congress, become the only legal basis upon which freight and passengers can be transported, and that the shipper is as much obliged to know what the published tariff rates are as is the carrier. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *T. & P. R. Co. v. Mugg & Dryden*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Southern Ry. Co. v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936. Hence, where the published tariff provides two rates, one with the carrier's ordinary liability, and the other a lesser rate by reason of liability being limited, and the shipper makes no selection of rate, it is proper

*See extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384.

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for the carrier to elect which rate shall apply. We hold, however, that the bill of lading or receipt showing the limited liability must be executed and delivered at the time the carrier accepts the shipment, or promptly mailed, in due course of business, before a loss occurs. The carrier cannot wait until after the goods have been destroyed, and then choose to make the lower rate, with the limited liability, apply to the shipment.

This modification does not affect the result in this case. The judgment appealed from is affirmed.

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(Supreme Court of Washington, Feb. 11, 1908.)

[93 Pac. Rep. 908.]

Carriers—Carriage of Goods—Freight Rates—Liabilities.*—Where two freight rates are provided by a carrier, one in contemplation of the ordinary carrier's liability, and the other a less rate by reason of a limitation of that liability, and goods are delivered to it for shipment in the ordinary manner, without any agreement relative to any limitation of liability or reduction in freight charges, the carrier assumes the ordinary liability of a carrier, and the law will imply that the usual rate is the one which was intended.

Fullerton, Mount, and Rudkin, JJ., dissenting.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by W. H. Harris against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. J. Gordon and Charles A. Murray, for appellant.

Swanson & Ripley, for respondent.

ROOT, J. This action was begun by the respondent against the appellant to recover \$1,454.10, the alleged value of household goods which were shipped by the respondent from Somers, Mont., to Spokane, Wash. Appellant's answer contained two affirmative defenses; one that at the time the goods were shipped respondent signed an agreement accepting a lower rate for the transportation of said goods and binding himself that in the event of loss his recovery should not exceed the valuation of \$5 per hundred-weight. The second affirmative defense set forth that defendant was engaged in interstate commerce, and kept on file in its offices at stations along its railway schedules of rates at which freight

*See preceding case, and foot-note.

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would be transported; that during all of the times involved such schedules were on file at Kalispell, Mont., where the contract of shipment was made for the goods in question, there being no station at Somers, Mont., and that said schedules so on file contained its rates for household furniture from Somers, Mont., to Spokane, Wash., one rate being 50 per cent. lower than the other, and said lower rate being based upon the condition published in said schedules; that in the event of loss of goods shipped at said lower rate the shipper should recover for such loss not to exceed \$5 per hundredweight, and that while said rates were so on file the plaintiff, with knowledge of said rates and the conditions pertaining to the respective rates, caused to be shipped the goods described in his complaint from Somers, Mont., to Spokane, Wash., and at the time of delivery of said goods to the appellant for transportation respondent requested that said goods be shipped at said lower rate, based upon said condition pertaining thereto; that the appellant accepted said goods for transportation upon said condition; that while said goods were in transit, and without any fault on the part of the appellant, they were consumed by fire; that the weight of said goods was 4,280 pounds, and the value at \$5 per hundredweight \$214, which amount appellant offered to pay, and tendered into court, together with \$4 accrued costs. The case was tried to a jury, and resulted in a verdict in favor of the respondent for \$1,198.85, for which sum judgment was rendered, and from which judgment this appeal is taken.

In his reply respondent denied that he signed the agreement above mentioned, and the verdict may be taken as a finding by the jury that he did not sign the agreement. Respondent in his reply denied that he knew of the schedule of rates being on file, or knew the conditions attached. Respondent also testified that all that was said about freight or rates at the time the goods were shipped was that the freight would be paid to Spokane. It appears to be conceded that the jury found that the respondent did not sign any contract of release. It is urged, however, by appellant that, under the interstate commerce law, the shipper was obliged to take notice of the published tariff rates of the railway company, and must be charged with the knowledge of the two rates that were provided by said tariff schedule. As to what extent the shipper or intending shipper shall take notice of the posted or published schedule of rates, we are not called upon to decide at this time. From evidence offered by appellant it appears that the schedule reads as follows: "Household goods not for sale or speculation, individual personal effects, secondhand furniture, stoves, etc., carrier's liability limited to \$5 per hundred pounds in case of loss, and so receipted for, car load shipment prepaid guaranteed, less than car load shipments prepaid, first-

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class rate. Household goods, not otherwise specified, not for sale or speculation, car load shipments prepaid or guaranteed, less than car load shipments prepaid, first and a half." The clause therein "and so receipted for" would seem to indicate that the rate therein provided for should apply only where a receipt was actually issued showing the limitation of the liability. It does not appear that respondent received any such receipt or entered into any agreement whatever for a limitation of the carrier's ordinary liability. Where two rates are provided, one in contemplation of the ordinary carrier's liability, and the other a less rate by reason of a limitation of that liability, it would seem, in the absence of an understanding or agreement between the shipper and the transportation company, that the carrier would assume the ordinary liability which rests upon a common carrier of goods, and that the usual rate for carrying said goods would be the one which the law implies. In other words, the lesser rate is only available as a matter of special contract, or where it is intended and understood by the shipper and carrier to apply in a given instance. In this case it appears that the respondent delivered his goods to the appellant for shipment in the ordinary manner, without anything being said, and without any arrangement being made, or any agreement being entered into, relative to any limitation of liability or reduction in the freight charges from the usual rate charged for ordinary shipments with the usual carrier's liability.

This being true, we think the rulings of the trial court complained of were not erroneous, and that the judgment of that court is sustained by the evidence and the law. It is therefore affirmed.

HADLEY, C. J., and CROW and DUNBAR, JJ., concur.

CARLETON *v.* CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Alabama, April 23, 1908.)

[46 So. Rep. 495.]

Appeal—Rulings on Pleadings—Prejudice.—Plaintiff was not prejudiced by an order sustaining demurrers to certain counts of the complaint, where plaintiff thereafter filed a number of other counts, stating substantially the same cause of action, under which all of the evidence which would be relevant to the original counts was admissible.

Carriers—Duty to Passengers.*—A carrier owes the duty to a passenger to provide a safe place for him to ride, to see that he is treated with respect by its servants, and not to expose him to unnecessary peril.

Same—Regulation—Passengers—Different Classes.—While a carrier may make and enforce regulations providing different cars for white and colored passengers, a conductor, in requiring the white passengers to leave the car provided for colored passengers, was bound to do so in a reasonable manner and at such a time and under such circumstances as would not expose the passenger to increased danger.

Same—Question for Jury.—In an action for the death of plaintiff's intestate by falling from a train while in rapid motion as he was being pushed from the car provided for colored passengers into that intended for white passengers by a conductor, whether intestate was killed by breach of duty on the part of such conductor held for the jury.

Appeal from Circuit Court, Tallapoosa County: A. H. Alston, Judge.

Action by H. M. Carleton, as administrator, etc., against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The case made for plaintiff is sufficiently stated in the opinion of the court. The defense set up by way of special pleas and the proof was that the railroad had a regulation, as required by the statute laws of the state of Alabama, as to where passengers of different classes should ride; that plaintiff was a white man, and

*For the authorities in this series on the subject of the liability of carriers of passengers for insults by employees, and the damages recoverable therefor, see last foot-note appended to *Cincinnati, etc., Ry. Co. v. Harris* (Tenn.), 19 R. R. R. 762, 42 Am. & Eng. R. Cas., N. S., 762; last foot-note appended to *Boling v. St. Louis & S. F. R. Co.* (Mo.), 22 R. R. R. 456, 45 Am. & Eng. R. Cas., N. S., 456; *Georgia Ry., etc., Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789; foot-note appended to *Linsay v. Wabash Ry. Co.* (Mich.), 20 R. R. R. 62, 43 Am. & Eng. R. Cas., N. S., 62.

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was riding in a coach with colored passengers; that this was against the statute and rules of the company; that under the law and the regulations the conductor was forced to require him to move from one coach into the other; and that by being in the colored coach plaintiff's intestate proximately contributed to the injuries which resulted in his death. At the conclusion the court gave the general affirmative charge for the defendant.

James W. Strothers, for appellant.

George P. Harrison, for appellee.

SIMPSON, J. This was an action for damages for the wrongful killing of the plaintiff's intestate. It is insisted, first, that the court erred in sustaining the demurrers to the first 10 counts of the complaint. After the sustaining of said demurrers, the plaintiff filed a number of other counts, which substantially state the same cause of action as alleged in said 10 counts, and under which all of the evidence which would be relevant to said 10 original counts could be considered. Consequently, if there was error in sustaining the demurrers to these first 10 counts, it was error without injury.

The court gave the general affirmative charge in favor of the defendant. There was evidence which tended to show that the conductor, or the person who was acting as conductor, ordered the plaintiff's intestate to leave the car in which he was, and to go into another, while the train was in rapid motion at night; also that said official caught him by the shoulder, pushed him out of the door, and shut the door behind him; and that as said intestate went to step across the coupling he fell off. The carrier owes the duty to the passenger to provide a safe place for him to ride, to see that he is treated with respect by its servants, and not to expose him to unnecessary peril. While the law recognizes the right of the carrier to make and enforce reasonable regulations with regard to the cars to be occupied by different classes of passengers, yet, in requiring passengers to pass from one car to another, not only must it be done in a respectful manner, but it must be done at a time and in a way that will not expose the passenger to increased danger.

It is recognized that it is dangerous for a passenger to pass from one car to another while the train is in rapid motion; and while the improvements, in arranging the platforms and vestibuling the cars, has minified and in some cases done away entirely with the danger of passing from car to car, so that it cannot be said that in every case it is contributory negligence for a passenger to pass from one car to another, or negligence for the conductor to require him to pass from one to another, while the train is in rapid motion, this depends upon the conditions, such as the manner in which the cars are coupled, the speed at which the

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train is moving, the condition of the track, and whether it is straight or curved, and also upon the condition of the passenger; for, if the passenger is weak or intoxicated, greater caution is suggested. If the conditions were such as to render it dangerous for plaintiff's intestate to pass from one car to another, and he was either forced or ordered out of the car in which he was riding, by the conductor or some one who was acting as conductor, and as a consequence he came to his death, the defendant would be liable. 2 Hutchinson on Carriers (3d Ed.) pp. 1085, 1323, §§ 950, 1125; 3 Hutchinson on Carriers (3d Ed.) pp. 1398, 1399, 1405, 1408, §§ 1192, 1197; Dougherty v. Yazoo & M. V. R. Co., 84 Miss. 502, 36 South, 699, 700; State v. Maine Cent. R. Co., 81 Me. 84, 92, 16 Atl. 368; L. & N. R. R. Co. v. Kelly, 92 Ind. 371, 374, 375, 47 Am. Rep. 149; McIntyre v. N. Y. Cent. R. Co., 37 N. Y. 287, 288; Worthington v. Cent. Vt. R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326, 330; So. Ry. Co. v. Roebuck, 132 Ala. 412, 31 South. 611; Fox v. Mich. Cent. R. Co., 138 Mich. 433, 101 N. W. 624, 68 L. R. A. 336, 340.

It results that the court erred in giving the general charge in favor of the defendant.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

SOUTHERN EXPRESS CO. v. GIBBS.

(Supreme Court of Alabama, April 21, 1908.)

[46 So. Rep. 465.]

Carriers—Carriage of Goods—Limitation of Liability—Negligence.*—It is violative of public policy for a carrier, as a paid bailee, to limit the extent of its liability for the negligence of itself or its agents or servants by an agreed valuation upon consideration of reduced charges for carriage of goods, when such agreed valuation is

*See first foot-note appended to Central of Georgia Ry. Co. v. Merrill & Co. (Ala.), 28 R. R. R. 786, 51 Am. & Eng. R. Cas., N. S., 786; last foot-note appended to Siemonsma v. Chicago, etc., Ry. Co. (Iowa), 28 R. R. R. 140, 51 Am. & Eng. R. Cas., N. S., 140; Central of Georgia Ry. Co. v. City Mills Co. (La.), 27 R. R. R. 103, 50 Am. & Eng. R. Cas., N. S., 103.

For the authorities in this series on the subject of the right of a common carrier to limit the amount of liability for loss of or danger to freight, see last foot-note appended to Matheson v. Southern Ry. Co. (S. Car.), 28 R. R. R. 130, 51 Am. & Eng. R. Cas., N. S., 130; first foot-note appended to Winslow Bros. & Co. v. Atlantic Coast Line R. Co. (S. Car.), 28 R. R. R. 116, 51 Am. & Eng. R. Cas., N. S., 116; De Wolff v. Adams Express Co. (Md.), 26 R. R. R. 611, 49 Am. & Eng. R. Cas., N. S., 611.

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disproportionate to the real value of the goods, though the contents of the package or its real value be not disclosed to the carrier.

Contracts—Validity—What Law Governs.—A contract, as to its nature, obligation, and validity, is governed by the law of the state where made, unless it is to be performed in another state, in which case it will be governed by the law of the place of performance.

Carriers—Contracts of Carriage—Construction—Place of Performance.—Where a shipper contracted in New York with a carrier to ship goods and deliver them at Birmingham, Ala., the contract, so far as delivery was involved, was to be wholly performed in Alabama, and the carrier's liability for failure to deliver depended upon the law of that state.

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Clara D. Gibbs against the Southern Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

In view of the decision it is deemed advisable to set out the second plea, which is as follows: "For further answer the defendant says that that alleged shipment was made by plaintiff's agents in two cases under a contract or a bill of lading, partly printed and partly written, under which the Adams Express Company agreed to carry the goods upon the terms and conditions therein set forth, to which the shipper agreed, and as evidence thereof accepted the said bill of lading. And defendant avers that among other terms and conditions set forth and contained in said bill of lading were the following: 'In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation not exceeding \$50 unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50 unless a greater value is stated therein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50 if no value is stated therein. The terms and conditions of this contract shall apply to any forwarding or return of said property, and shall inure to the benefit of every carrier to whom the same may be intrusted to complete the transportation.' And defendant avers that when it received said goods from the Adams Express Company under its contract it became entitled to all the benefit of the terms and conditions of said bill of lading. And defendant avers that the said shipment was made and said contract executed in the city and state of New York, by the agent of the plaintiff, and, though said agent was asked the value of the goods at the time of the shipment, no value was given, but in said bill of lading was written or stamped 'Value asked and not given.' And defendant avers that neither the Adams Express Company nor this defendant knew or had notice or knowledge

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of the contents or value of said package, and the rate charged for the transportation of said package was under the terms of said bill of lading based and fixed upon a valuation not exceeding \$50, and if the value of said goods had been disclosed the rate would have been higher. And defendant avers that said contract was made and accepted in the city and state of New York as aforesaid, and under the laws of the state of New York the Adams Express Company could lawfully limit the liability of itself and this defendant to the sum of \$50 in case of the loss of said goods, as provided in said contract or bill of lading. And defendant avers that at and before the bringing of this suit it tendered to the plaintiff the sum of \$50 lawful money, which plaintiff refused to accept, and it now brings said sum of \$50, with the costs accrued to this date, into court, and pleads said tender in discharge of its liability under said contract."

London & London, for appellant.

John H. Miller and A. Leo Oberdorfer, for appellee.

TYSON, C. J. This action is to recover damages for the breach of a contract. The breach alleged and relied on for recovery is the defendant's failure to deliver to plaintiff at Birmingham, in this state, certain goods, which it contracted to deliver as a common carrier for a reward. The value of the goods was alleged to be \$800. Special pleas 2 and 3, to which a demurrer was sustained, do not deny the contract to deliver or its breach as alleged, but seek simply to confine the amount of plaintiff's recovery to the sum of \$50, which it is alleged in these pleas was the agreed value of the goods when accepted for shipment by the Adams Express Company in the city of New York, and that such a stipulation is valid under the laws of New York. It is not averred in either of them where the contract for the acceptance and delivery of the goods was made with this defendant. For aught appearing, the contract with defendant was entered into in some state other than New York, and where the same rule prevails with respect to the invalidity of such a contract as does in this state. *Southern Express Co. v. Owens*, 146 Ala. 413, 418, 41 South. 752, 8 L. R. A. (N. S.) 369. That rule is that it is violative of public policy for a carrier, as a paid bailee, to limit the extent of its liability for the negligence of itself or its agents or servants by an agreed valuation upon consideration of reduced charges for carriage of goods, when such agreed valuation is disproportionate to the real value of the goods, although the contents of the package or its real value are not disclosed to the carrier. *Southern Express Co. v. Jones*, 132 Ala. 437, 31 South. 501; *Southern Express Co. v. Owens*, *supra*, and cases there cited. It may be that we could rest our decision of the insufficiency of these pleas upon this point, but we do not care to do so.

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The insistence is that, as the stipulation limiting defendant's liability to \$50 is valid under the laws of New York, where made, it should be enforced by the courts of this state, notwithstanding it is in violation of the public policy of this state as declared by our decisions. Whether this court is committed by former decision to the proposition asserted is not necessary, under the view we take of this case, to be here determined. The rule seems to be universal that a contract, as to its nature, obligation, and validity, is to be governed by the law of the state where made, unless it is to be performed in another state. As said by Mr. Justice Story, and approved by this court in *Hanrick v. Andrews*, 9 Port. 26: "When the contract is expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties—that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." See, also, 1 Brickell's Dig. p. 252, §§ 19, 20, 21, 22; 3 Brickell's Dig. p. 125, § 18; Clark on Contracts, p. 507. According to the complaint the defendant contracted to deliver the goods in this state. The place of performance was Birmingham, in this state. The delivery could have been made nowhere else, and therefore the contract, so far as delivery was involved, was to be wholly performed in this state. Transporting the property out of the state of New York and through other states did not constitute performance. "That was merely a means of enabling the company to perform by delivery of the property at its destination." *Pittsburg Ry. Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

In *Curtis v. Del., Lack. & Western R. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271, the plaintiff sought to recover damages for the loss of his baggage, which was to be delivered by the defendant carrier in New York City. The contract was made in the state of Pennsylvania, and under the statute of that state the defendant's liability for its loss was limited to \$300. The court said: "The baggage, for which recovery was had, was delivered to defendant at Scranton, in the state of Pennsylvania, to be transported to and delivered in the city of New York. The first question which arises on this appeal is whether the statute of the state of Pennsylvania passed in 1867, which limits and defines the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, forms a part of the contract between the plaintiff and the defendant, and should be considered as determining the right to recovery and the amount of the recovery. I think that the statute cited has no application, and that the rights of the parties must be determined in accordance with the laws of the state of New York, which are applicable to such contracts, as is manifest by referring to the principles which govern contracts of this description. One of the rules applicable to the sub-

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ject is that the *lex loci contractus* is to govern, unless it appears upon the face of the contract that it was to be performed in some other place, or made with reference to the laws of some other place, and then the rule of interpretation is governed by the law of the place. *Dyke v. Erie Railway Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103. The place of delivery was a material and important part of the contract, and until such delivery the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff in the city of New York, there was a breach of the contract; and, as the final place of performance was in that city, it would seem to follow that, within the rule laid down, the contract was to be governed, at least so far as a delivery is concerned, by the laws of New York. This certainly was to be done in a different place from where the contract was made, and it is a reasonable inference that it was in the contemplation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered. So, also, when it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed. *Sherrill v. Hopkins*, *supra*, p. 108, and authorities there cited; *Thompson v. Ketchum*, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; 4 Kent's Com. 459. The place of final performance of the contract being in the city of New York, although the transportation was mostly through other states, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this state which, it is claimed, sustain the doctrine that the locality where the contract was made, in cases of this character, must control. None of the cases cited are entirely similar to the one at bar, and none involve the precise point now considered. But, even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered." In *Brown v. Camden R. R.*, 83 Pa. 316, where the contract was made with the railroad company in Philadelphia, Pa., to transport the plaintiff and his baggage from that point to Atlantic City, N. J., the court held that, although its performance required the transportation of plaintiff and his baggage across the Delaware river, which divided the two states, its validity and effect was to be determined by the law of New Jersey, and not by that of Pennsylvania. The court distinctly placed its holding upon the point that, as the delivery of the baggage was to be in New Jersey, the contract was to be performed wholly in that state. These cases are directly in point, and we think sound. See, also, 1 Hutchinson on Carriers, §§ 202, 203.

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Southern Ry. Co. v. Harrison, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936, seems to be relied upon as supporting the proposition that the stipulation relied on in the pleas must be governed as to its validity by the New York law, because made there and the performance begun there, and, therefore, conclusive against the view that the contract was to be wholly performed in this state. Suffice it to say no such point was presented in that case, as will readily appear by an examination of it. It is true the court stated the rule in general terms, but expressly said it had no application to the case. It is not perceivable how that case can be held to be an authority upon the question here presented. It follows, therefore, that the action of the court in sustaining the demurrer to the pleas under consideration was correct, as likewise was its ruling upon the demurrer to pleas numbered 5 and 6.

The judgment is affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

SHELLNUT v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Aug. 19, 1908.)

[62 S. E. Rep. 294.]

Carriers—Receipt of Goods—Conversion.*—A common carrier is bound to receive all goods offered that he is able and accustomed to carry, and to transport and deliver such goods in pursuance of the bailment; and, where he receives goods offered, the possession thereof by the person offering the same as freight being apparently rightful, though as a matter of fact it may not be actually so, the carrier will not be liable as for a conversion, in an action brought by the true owner, unless the latter intervenes before the goods are delivered and demands them, or gives notice of his right to the property in question and of his intention to enforce it.

(Syllabus by the Court.)

*For the authorities in this series on the subject of the duty of railroad companies, as common carriers, to receive and carry freight, see monograph appended to *Carter v. Wilmington W. R. Co.* (N. Car.), 1 R. R. R. 131, 24 Am. & Eng. R. Cas., N. S., 131; second foot-note appended to *Baltimore & O. R. Co. v. Whitehill* (Md.), 22 R. R. R. 176, 45 Am. & Eng. R. Cas., N. S., 176.

For the authorities in this series on the question what constitutes conversion of freight by a carrier, see first foot-note appended to *Southern Ry. Co. v. Webb* (Ala.), 20 R. R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26, where all those preceding it are collected; *Missouri Pac. Ry. Co. v. Peru-Van Zandt Implement Co.* (Kan.), 25 R. R. R. 647, 48 Am. & Eng. R. Cas., N. S., 647; foot-note appended to *Louisville & N. R. Co. v. Britton* (Ala.), 23 R. R. R. 491, 46 Am. & Eng. R. Cas., N. S., 491.

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Error from Superior Court, Haralson County; R. W. Freeman, Judge.

Action by J. T. Shellnut against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Spencer R. Atkinson and *J. S. Edwards*, for plaintiff in error.
J. Branham, *G. E. Maddox*, and *E. S. Griffith*, for defendant in error.

BECK, J. The plaintiff's suit was for the conversion of 33 described bales of cotton, of the value of \$1,800, which were alleged to have been wrongfully taken and carried away by the railroad company. On the trial the plaintiff testified, in substance, as follows: He was familiar with the buying and selling of cotton, and had been shipping cotton for several years. The cotton sued for was part of a lot of 300 bales, which he had bought, and which he was negotiating to sell to the E. S. Ehney Cotton Company of Atlanta, through their agent S. O. Haney, with whom plaintiff was dealing personally. The cotton was stored in the Merchants' & Planters' warehouse in Bremen, and it was customary, in making sales, to make out an invoice of the cotton and deliver the invoice to the buyer when payment is made. The plaintiff agreed with the agent Haney to sell to the E. S. Ehney Cotton Company the 300 bales of cotton at a certain price per pound, and delivered to Haney, and also to the warehouseman, a copy of the invoice above referred to. The purchase price amounted to \$13,000, and Haney paid plaintiff \$8,000, which he received on account. Plaintiff's agreement with Haney was that the latter should get the cotton out of the warehouse, line it up, and grade it preparatory to shipment. As to who should make delivery of the cotton to the railroad company, and the circumstances under which such delivery should be made, the plaintiff's evidence is somewhat confused. At one time he testifies that he expected Haney to have the cotton loaded on the cars, receive the bill of lading, and settle with him afterwards as to the balance of the purchase money, while from other portions of his testimony it seems that Haney had authority merely to prepare the cotton for shipment, and was not to deliver to the railroad except in conjunction with the plaintiff. But the agreement between the plaintiff and Haney contemplated a cash sale, and a payment by Haney of the balance of the purchase money before plaintiff's claim upon the bill of lading was finally surrendered to Haney. The plaintiff had given the railroad company no authority to ship the cotton. After delivering the warehouse invoice to Haney, and receiving the \$8,000 from him, the plaintiff left Bremen for a few days, and upon his return discovered that the cotton had been shipped away. Upon inquiry of the railroad agent at Bremen the plaintiff learned that Haney

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had shipped the cotton to the E. S. Ehney Cotton Company of Atlanta, the railroad agent stating that he thought it was all right. Plaintiff then made a demand of the railroad agent for the bill of lading, which was refused. No demand was made for the price of the cotton. Upon inquiry it was ascertained that Haney had left the place, and was not to be found. Plaintiff then proceeded to Atlanta, and demanded the balance of the purchase price from the E. S. Ehney Cotton Company, who stated to him that they did not "know him in the transaction," but bought the cotton from Haney, who was their road agent, buying under instructions from them, but who had no authority, in this instance, to purchase the 300 bales of the plaintiff. However, they paid the plaintiff \$4,000, which he received, but under protest that it was not sufficient to satisfy the balance due him. The amount due him was \$1,800, and the value of this in cotton the plaintiff calculated to be 33 bales of the weight, grade, and price per pound set forth in the petition; and the 33 bales sued for were the last 33 described in the warehouse invoice of the 300 bales. The cotton had been shipped in 100 bale lots, and the 33 bales in question were selected from the last lot shipped. Two bills of lading, covering 50 bales each of this lot, were introduced in evidence, showing shipment by Haney, consigned to "order notify E. S. Ehney Cotton Company, Atlanta, Ga." Plaintiff offered in evidence the receipt given by him to the Ehney Cotton Company for the \$4,000 paid him, in which it was recited that the receipt was in full for all demands, "excepting my claim against the Ehney Cotton Company for the value of certain bales of cotton claimed by me to have been converted by the Ehney Cotton Company." The receipt was ruled out, upon the objection that it was irrelevant and a declaration of plaintiff in his own interest, to which ruling plaintiff excepted.

Plaintiff also excepted to the refusal of the court, upon objection upon the ground of irrelevancy, to allow him to testify that he owned a plantation at the time of the contract of sale of this cotton, and had produced on his plantation during that year 30 bales of cotton. Upon this evidence the court, on motion, granted a nonsuit, and the plaintiff excepted. Even if we view the evidence most favorably to the plaintiff in this case, we must affirm the judgment of the court below granting a nonsuit. Admitting that the title to the cotton had never passed from Shellnut, and that, when Haney took possession of it and delivered it to the railroad company, he was not rightfully in possession of the same, still he was apparently, so far as the railroad company knew, so far in the rightful possession of the property that he had a right to deliver it for shipment, and take the bill of lading which was issued to him by the company. And, the bill of lading having been issued in the name of Haney, the cotton was shipped and delivered under that bill of lading; and when it was so shipped

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and delivered, the company was free from any liability for a conversion, as no demand was made upon it for the property while it was in its possession. It seems to be a well-settled principle that a common carrier is guilty of no conversion "though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner.

* * * Common carriers, by reason of the nature of their business, which imperatively requires them to receive and forward goods when tendered in the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes, in similar cases, a conversion. The authorities on this point are abundant: *Greenway v. Fisher*, 1 Car. & P. 190; *Ross v. Johnson*, 5 Burr. 2825; *Fowler v. Hollins*, 7 L. R. Q. B. 616; *Hiort v. Bott*, L. R. 9 Ex. 86; *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289; *Smith v. Colby*, 67 Me. 169; *Strickland v. Barrett*, 20 Pick. (Mass.) 415; *Loring v. Mulcahy*, 3 Allen (Mass.) 575; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Waring v. Railroad Co.*, 76 Pa. 491." *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; *Cooley on Torts* (3d Ed.) 877; *Hutch. Car.* §§ 148, 753. See, also, 6 Cyc. 472, and numerous cases there cited. "A common carrier must accept freight from every one offering the same, and is not guilty of conversion in accepting freight from a party in possession thereof, unless the true owner intervenes before the goods are delivered and demands them." *Robert C. White Live Stock Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 30. To lay down a different rule would be productive of results that would not only work great hardships upon common carriers, but, in many cases, would amount to the grossest injustice, especially in view of the provisions of Civ. Code 1895, §§ 2278, 2286. The first of these sections provides that: "A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public." The latter section declares that: "The carrier cannot dispute the title of the person delivering the goods to him, by setting up adverse title in himself, or a title in third persons, which is not being enforced against him."

If the doctrine insisted upon by the plaintiff in this case should be set up and adhered to as a rule of law, then a common carrier, when property was offered to it for shipment, could not, with safety, receive the same for transportation until it had taken time to investigate and ascertain whether or not the person in possession of the property was the owner of it, or rightfully in possession of it. Our attention is called, in the brief of counsel, to the case of *Sou. Express Co. v. Palmer*, 48 Ga. 85, where it is apparently held that "a carrier who receives goods to carry from

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one not authorized to deliver them to him is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be." An examination of that case, however, shows that the extract which we have quoted is mere obiter, as the question which is there apparently ruled, was not involved in the case. The case of Charleston Ry. Co. v. Pope, 122 Ga. 577, 50 S. E. 374, is cited as one recognizing and applying the rule apparently laid down in the Southern Express Co. Case, last above referred to. But an examination of the case of Railroad Co. v. Pope reveals that, at the time of bringing the action against the railroad company by Pope & Fleming, the carrier company had not parted with the possession of the goods for the conversion of which they were sued. While in the case of Georgia Railroad Co. v. Haas, 127 Ga. 187, 56 S. E. 313, 119 Am. St. Rep. 327, it was held that a carrier cannot refuse to recognize the demand of the true owner of the property, made while such property is in the carrier's possession, and duly pressed, and carry it away, and deliver it to a person who does not own it, or his order, merely because the carrier received it from such person as consignor, there is no intimation in that case that, if the property had been carried and delivered in pursuance of the directions given by the person who, being in possession of it, offered it for carriage, before demand was made by the true owner, the carrier would have been liable as for a conversion. Indeed, the argument and the reasoning in that case tend very strongly to the conclusion which we have reached in this. We do not think it could be said that, where a railroad company receives property for transportation, which the law imperatively demands that it shall receive when it is offered, and then, acting, as was said in the case of Nanson v. Jacob, *supra*, "as a mere conduit," delivers it in pursuance of the bailment, it can be said to exercise "a dominion over it in exclusion or in defiance" of the true owner's rights, because, if the true owner should, before the delivery of the property by the carrier in pursuance of the bailment, make demand for it, or show his right to the possession of it, and give notice of his intention to enforce that right, then the carrier would be bound to recognize that right, or, refusing to do so, would refuse at its peril.

Exceptions were taken to the refusal of the court to admit certain evidence tendered by the plaintiff. It is not necessary to pass upon the question raised by these assignments of error, as the decision which we have made upon the controlling question in the case could not possibly be affected, if we consider the evidence which was tendered and repelled by the trial court, which is here as a part of the brief of evidence in the case.

Judgment affirmed. All the Justices concur.

FUNDERBURG *v.* AUGUSTA & A. RY. CO.

(Supreme Court of South Carolina, July 29, 1908.)

[61 S. E. Rep. 1075.]

Appeal and Error—Review—Findings—Conclusiveness.—Findings on conflicting evidence are conclusive on appeal.

Carriers—Electric Railroads—Regulations—Effect.*—A carrier may adopt reasonable rules for the transaction of its business, and passengers must comply therewith.

Same—Fares—Making Change.†—An electric railway rule authorizing conductors to refuse to give more than \$1.95 in change for a single fare, but to make change in larger amounts if convenient, etc., is reasonable.

Evidence—Judicial Notice—Density of Population, etc.‡—The Supreme Court will take judicial notice of the territory, the density of population, and numerous mill towns along an electric railway route between Augusta and Aiken.

Carriers—Electric Railroads—Fares—Making Change.†—Under an electric railway company rule authorizing a conductor to refuse to make change for more than \$2, unless convenient to do so, he was not bound to change a \$5 bill, though he had sufficient change; he being allowed considerable discretion in deciding whether he had sufficient change for the probable demands of the trip to allow him to change more than \$2 in a particular case.

Same—Necessity for Giving Notice of Rules.—A carrier need not bring home to each passenger personal knowledge of the existence of a reasonable rule.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Aiken County; Geo E. Prince, Judge.

Action by A. M. Funderburg, by B. F. Funderburg, his guardian ad litem, against the Augusta & Aiken Railway Company.

*For the authorities in this series on the question of the validity of a carrier of passengers' rules and regulations, see last foot-note appended to *Illinois Cent. R. Co. v. Allen* (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49, where all those preceding it are collected; foot-note appended to *Birmingham Ry., etc., Co. v. McDonough* (Ala.), 26 R. R. R. 618, 49 Am. & Eng. R. Cas., N. S., 618; foot-notes appended to *DeBoard v. Camden Interstate Ry. Co.* (W. Va.), 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84.

†See second foot-note appended to *Louisville & N. R. Co. v. Cottengim* (Ky.), 25 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659.

‡See second foot-note appended to *People v. Illinois Cent. R. Co.* (Ill.), 28 R. R. R. 722, 51 Am. & Eng. R. Cas., N. S., 722; fourth foot-note appended to *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; first foot-note appended to *Valente v. Sierra Ry. Co.* (Cal.), 26 R. R. R. 676, 49 Am. & Eng. R. Cas., N. S., 676.

Funderburg v. Augusta & A. Ry. Co

From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Boykin Wright, Geo. T. Jackson, and J. B. Salley, for appellant.

Hendersons, for respondent.

JONES, J. We are convinced that there should be a new trial, on the ground that there was no evidence tending to show any willful disregard of duty to plaintiff. The plaintiff, on November 10, 1907, boarded defendant's train at Langley to go to Warrenville. When the conductor demanded the usual fare of 5 cents, plaintiff tendered a \$5 bill. The finding of fact which is conclusive of this court, since there is some conflict in the testimony, is that the conductor had more than \$5 in change at the time. The following rule of the defendant company was in force at that time. "Order No. 240. November 4, 1907. Notice to All Conductors. Owing to the scarcity of change and impossibility of our conductors being able to supply change for amounts over \$2 tendered for car fare, conductors on both divisions are hereby notified that they are not required to give more than \$1.95 in change for a single fare. Conductors are requested to accommodate passengers, if possible or convenient, for amounts exceeding \$2. If sums of \$5 or more are offered, conductor should take the amounts and request smaller change, and if passenger cannot or will not tender a smaller amount, conductor should ring up fare and notify passenger that change will be handed him at office of company, or at end of line. Demand name and address at same time for conductor's protection. Augusta-Aiken Railway & Electric Co., E. P. Whetmore, General Manager." The plaintiff testified that he had no notice of such rule, and we are bound by the finding of the circuit court that the rule had not been brought to the attention of the traveling public in any manner, as it cannot be said that such finding was wholly without evidence to support it. When the plaintiff tendered the \$5 bill, the conductor informed him that it was against the rules of the company to change over a \$2 bill. The plaintiff declined to leave the bill with the conductor to be changed at the end of the line, whereupon the conductor informed him that he would have to pay his fare, or get off at Gloverville. On reaching Gloverville, the conductor informed the plaintiff that he would have to get off, whereupon plaintiff left the train, waited an hour for the next train, and pursued his way. There was not the slightest evidence of rudeness or violence on the part of the conductor towards the plaintiff. Assuming that it was his duty to enforce the rules of the company, it must be conceded that he breached no propriety in the manner of its enforcement.

The case of *Gwynn v. Telephone Co.*, 69 S. C. 434. 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819, is authority for the

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proposition that "a tort, committed by mistake in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or a conscious disregard of the rights of others, will not warrant the giving of damages for punishment." The defendant company unquestionably had the right to adopt reasonable rules for the transaction of its business, and it is the duty of the passengers to comply with such rules. The circuit court has found in this case that "a tender of \$5 to pay a 5 cent fare would be disproportionate to the amount of the fare, and that, under a proper rule on the part of the carrier upon the subject, in existence and actually enforced, the carrier could not be forced to furnish change for so large an amount." He, however held that such rule had not been brought to the notice of the traveling public, and had been habitually disregarded and waived. This shows that the circuit court would have regarded as unreasonable the tender to the defendant railroad of \$5 for a 5 cent fare, had it been admitted that defendant had promulgated a rule to that effect, and had not waived it. There is therefore no finding below that the rule is unreasonable, and indeed there is no fact appearing in the record to suggest a doubt of its reasonableness. The difficulty of making change in the cotton picking season in South Carolina is a well-known fact, and the court takes notice of the territory and the thick population and the numerous mill towns along the route between Augusta and Aiken, which renders it probable that numerous fares will be collected on the defendant electric railway between these points on a single trip. To require defendant to furnish change for every bill presented would be unreasonable.

The California and New York courts agree upon the proposition "that a passenger upon a street railway is not bound to tender the exact fare, but must tender a reasonable sum and the carrier must accept such tender, and furnish change to a reasonable amount," but in California the court, in view of local conditions, held that a tender of a gold coin of \$5, the lowest gold coin in use in that section, for a 5 cent fare was reasonable (*Barrett v. Market St. Ry. Co.*, 81 Cal. 295, 22 Pac. 859, L. R. A. 336, 15 Am. St. Rep. 62), whereas in New York it is held that conductors cannot be required to furnish change for a \$5 bill in payment of street car fare, and that a rule of the company requiring change to be made to the amount of \$2 is reasonable (*Barker v. R. R. Co.*, 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626). Conceding that the conductor had more than \$5 in change at the time plaintiff tendered his bill, that did not make it the conductor's duty to so deprive himself of change as to be unable to meet the reasonable requirements of the trip. Suppose he had \$6.80 in change at the time. If he had given plaintiff \$4.95 of that sum, he would thereby have rendered himself unable to give change to the next passenger presenting a \$2 bill.

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If he had failed to make change for such next passenger in breach of the rules of the company, would he not have violated the right of such passenger? Could not such passenger say: "You must change my \$2 bill, because your rules require it." Can it possibly be a willful breach of duty to the first passenger to decline to do that which would reasonably result in a breach of duty to the second passenger? It is true that the conductor on a number of occasions made change for \$5, but this was when he had "plenty of change," and this was not in disregard of the rules, but in strict conformity thereto. "Plenty of change" does not mean plenty for a single transaction, but plenty for the reasonable requirements of the trip. The conductor must necessarily be allowed some discretion in deciding whether he has such an amount in change for the probable demands of the trip as would allow him to change over \$2 in a particular case. We fail to find a scintilla of evidence in the record tending to show that the rule of the company had been habitually disregarded and waived. Indeed not one of the witnesses who testified as to seeing the conductor change a \$5 bill previously to the occasion in question say that it was done after the 4th of November 1907, when the rule was adopted. The rule had been recently adopted before the occasion in question, and possibly it was negligence to fail to give some public notice of it. But, as declared in the New York case above cited, it is not the duty of the carrier to bring home to each passenger a personal knowledge of the existence of a reasonable rule. When notice of the rule was brought home to the plaintiff it was his duty to make an effort to comply, and yet it appears by his own testimony that he knew some of the people on the car, but did not try to borrow a nickel, and there is not a particle of evidence that he made the slightest effort to have his bill changed by his fellow passengers.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

BIRMINGHAM RY., LIGHT & POWER CO. *v.* YIELDING.

(Supreme Court of Alabama, May 14, 1908.)

[46 So. Rep. 747.]

Action—Single and Entire Cause of Action—Carriers of Passengers—Complaint.—Where the gravamen of a count was the wrongful ejection of plaintiff from defendant's car, further averments as to other things proximately caused thereby were mere matters of inducement or aggravation, and did not render it subject to demurrer as seeking to recover both for wrongful ejectment and for assault and battery.

Carriers—Passengers—Ejection—Complaint—Damages.—Where, in an action against a carrier for ejecting plaintiff from its car, a count alleged that as a proximate consequence of the ejection the plaintiff was wrenched and made sick and sore, the allegations of damages were sufficient as against demurrer.

Same—Ejection of Passenger—Force.*—Though a carrier has the lawful right to eject a passenger, it is answerable in damages for any unnecessary force or violence inflicted upon him by its agents acting within the scope of their authority.

Same—Complaint—Sufficiency.—In an action against a carrier for wrongful ejection of plaintiff from its car, a count alleging that defendant's agent, acting within the scope of his authority, so negligently conducted himself in and about the carriage of plaintiff as defendant's passenger that as a proximate consequence thereof plaintiff was ejected from said train, was not subject to demurrer for failure to show the facts wherein defendant's servants negligently conducted themselves, and wherein plaintiff's ejectment was wrongful.

Same—Plea.—In an action against a carrier for wrongful ejection of a passenger, a plea attempting to justify the ejection by alleging that plaintiff changed cars during the journey and refused to pay a second fare after changing was insufficient on demurrer, where it failed to show a rule of defendant requiring collection of a second fare in such cases.

Same.†—Where a carrier has a rule which requires the collection of fares on each car of the train by the separate conductors on said cars, and that passengers changing cars must pay a second fare, a pas-

*As to the right to use force in ejecting a passenger, see last foot-note appended to *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629.

For the authorities in this series on the subject of the liability of the carrier for assaults on its passengers by its employees, see first foot-note appended to *Zeccardi v. Yonkers R. Co.* (N. Y.), 28 R. R. R. 771, 51 Am. & Eng. R. Cas., N. S., 771; *St. Louis, etc., R. Co. v. Wyatt* (Ark.), 26 R. R. R. 646, 49 Am. & Eng. R. Cas., N. S., 646; second foot-note appended to *Blomsness v. Puget Sound Elec. Ry.* (Wash.), 26 R. R. R. 640, 49 Am. & Eng. R. Cas., N. S., 640.

†See first foot-note appended to preceding case.

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senger, after taking passage on one car and paying his fare, is not authorized to take another car and refuse to pay a second fare when demanded, after being informed of the rule, although insufficient accommodations are provided on the first car.

Appeal from City Court of Birmingham, C. C. Nesmith, Judge.

Action by C. M. Yielding against the Birmingham Railway Light & Power Company for damages for being ejected from defendant's car. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The first count in the complaint, after setting forth that defendant was a common carrier of passengers for hire by means of electricity, and that plaintiff became a passenger on one of the lines from Birmingham to Avondale, and had paid his fare thereon, alleges that, notwithstanding the duty of defendant's servants and agents on said train to transport him safely, the said agents or servants, acting within the line and scope of their authority as such, wrongfully ejected plaintiff from said train, and as a proximate consequence thereof plaintiff was wrenched, made sick and sore, and suffered other special damages. The second count contained the same allegations as to what defendant was, and that plaintiff was its passenger, and that plaintiff had paid his fare to be carried from Birmingham to Avondale. It alleges that before said train reached Avondale defendant's servant or agent, acting within the line and scope of his authority as such servant or agent, while engaged in or about ejecting plaintiff from said train, used great and unnecessary force and violence, and as a proximate consequence thereof plaintiff suffered injuries and damages set out in the first count. Count 3 alleges that on said day plaintiff boarded said train at Birmingham, to be carried by the defendant as its passenger to said Avondale, and was received and accepted on such train by defendant's agent or servant, acting within the line and scope of his authority as such, and plaintiff paid to defendant the fare, to wit, five cents, regularly charged by it for so being carried; that defendant's servant or agent, acting within the line and scope of his authority as such, so negligently conducts himself in and about the carriage of plaintiff as defendant's passenger as aforesaid that as a proximate consequence thereof plaintiff was ejected from said train before the same reached Avondale and suffered the injuries and damages complained of.

Demurrers were filed as follows: To the first count: It does not appear therefrom how or wherein the assault on said plaintiff was the proximate consequence of said ejectment, for that the said count seeks to recover for an alleged wrongful ejectment and for an assault and battery in one and the same count. For that it does not appear therefrom that the alleged assault and battery committed on plaintiff is wrongful or unlawful, or that more force was used than was necessary in ejecting plaintiff from

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said train. The other demurrers to the first count raised the question of sufficiency of the allegations of damages. To the second count, the same as those filed to the first count, and with these additional: For that it does not appear that plaintiff was wrongfully ejected from said train. For that it does not appear what force and violence is used against plaintiff. For that the nature, character, and extent of the force and violence used against plaintiff is not set forth in said count. All the grounds of demurrer assigned to the first and seconds counts were assigned to the third counts, with the additional ground that no facts are therein alleged showing wherein or how the defendant's servants or agents negligently conducted themselves in or about the carriage of plaintiff as a passenger, and that no facts are alleged therein showing wherein plaintiff's ejectment was wrongful. It does not appear with sufficient certainty wherein or how the defendant or its servants or agents violated any duty which it owed the plaintiff.

The defendant filed the following pleas after demurrer overruled: (1) The general issue. (2) "And for further plea and answer to plaintiff's complaint, and to each count thereof separately and severally, the defendant says that plaintiff ought not to have and maintain this action against defendant, for that defendant at the time of the wrongs and injuries alleged in said complaint was running or operating two cars, the one attached to the other, the front car being called the 'motor car' and the rear car being called the 'trailer car;' and defendant avers that defendant had a separate conductor in charge of each of said cars at said time, and that plaintiff voluntarily took passage on the rear or trailer car, and paid his fare to the conductor in charge of said trailer car, while on said trailer car, and thereafter plaintiff disembarked in said trailer car and boarded and took passage on said motor car, and, upon demand being made of him by the conductor in charge of said motor car for his fare, plaintiff refused and failed to pay to said conductor in charge of said motor car a fare entitling him to be carried as a passenger on said motor car, whereupon plaintiff was ejected from said motor car by the conductor of said car, because he refused and declined to pay his fare on said motor car, and insisted on riding on said motor car without paying his fare; and defendant avers that no more force than was necessary was used in ejecting plaintiff from said motor car." Pleas 3 and 4 were practically the same as plea 2, with the additional allegation that the company had a rule in force which required the collection of fares on each car of the train by the separate conductors on said cars, and that one taking passage on a motor car and paying fare thereon was entitled to continue on said car to his journey's end; but, if said passenger left the motor car and boarded the trailer, such passenger was required also to pay fare on the trailer, and vice versa, and that plaintiff had no-

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tice of this rule, and was advised of it before being ejected, and was given an opportunity to return to the car on which he originally took passage before being ejected.

Demurrers were interposed to plea 2, because it failed to show any legal justification for an attempt to collect two fares for the same person; for that it fails to aver or show any reasonable rule for requirement of defendant that plaintiff as its passenger should continue his journey in the same car it was begun, and because it fails to show that plaintiff had any knowledge of any rule under which it was prohibited from changing cars on the same train. To pleas 3 and 4 demurrers were interposed upon the same grounds as to plea 2, with the additional ground that the plea shows on its face that the rule is not reasonable, and that it fails to aver or show that plaintiff had knowledge of the rule before he became a passenger on said train, and that said plea failed to show or aver that defendant furnished plaintiff with a convenient and comfortable place to ride on said trailer car.

To the third and fourth pleas the plaintiff filed the following replications: "For further reply to each of third and fourth pleas separately and severally plaintiff says that said trailer car and said motor car were attached together as said train, and both were being used by the defendant for the carriage of passengers at said time, and that said trailer car was crowded, and plaintiff could not obtain a seat thereon, and that plaintiff before said ejection informed the defendant's conductor of said motor car that said trailer car was crowded, and the said conductor knew that there was no seat available to plaintiff on said trailer car. (3) For further replication to each of third and fourth pleas separately and severally plaintiff says that said trailer car and said motor car were attached to the other as one train, and both were being used by the defendant for the carriage of passengers at said time, and that at the time he left said trailer car as stated in said plea it was very uncomfortable in said trailer car, in this, to wit: There was no unoccupied seat on same, and said car was crowded, and men were smoking tobacco to such an extent that same was very uncomfortable to plaintiff, and plaintiff disembarked from said trailer car, and took passage upon said motor car as aforesaid to escape the said inconvenience and discomfort, and before said ejection plaintiff informed the conductor of said motor car that said trailer car was crowded and of the discomfort on the trailer car, and neither said conductor nor defendant offered to remedy the same."

Demurrers were interposed as follows: To replication 2, because it is not alleged or shown therein that it was the duty of the conductor in charge of the motor car to carry plaintiff as a passenger free on said car; for that plaintiff became a new passenger on said motor car when he boarded the same; for that said replication sets up a failure to provide plaintiff with a seat as an

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excuse for violation of a rule of defendant; for aught that appears therefrom plaintiff was not refused a seat on said trailer car; for that said replication fails to show that plaintiff had demanded a seat on the car from which he disembarked; for aught that appears therefrom plaintiff did not have a seat on the trailer car when he paid his fare on said car. To the third replication the same as to the second with these additions: For that it appears therefrom that it became and was the duty of plaintiff either to have remained on said trailer car and brought his action for said discomfort, or to have paid his fare on said motor car and brought his action for said discomfort; for that it is not alleged or shown that plaintiff was forced to leave said trailer car by reason of any negligence or wrong of defendant, or its servants or agents; and for that said replication seeks to set up a wrong of defendant or its conductor in justification of his own wrong in insisting upon riding on said motor car without paying his fare. To both replications, for that they work a departure from plaintiff's cause of action, and that the replication sets up an alleged breach of contract.

Tillman, Grubb, Bradley & Morrow, for appellant.

Bowman, Harsh & Beddow, for appellee.

ANDERSON, J. The gravamen of the first count is the wrongful ejection of the plaintiff from the car, and the averment of other things proximately caused thereby are mere matters of inducement or aggravation, going to swell the damage. Nor was the first count of the complaint subject to the other grounds of demurrer insisted upon by the appellant in brief of counsel.

The second count does not charge that the ejection per se was wrong, but that it was made so by the use of unnecessary force and violence. Even if the defendant had the lawful right to eject the plaintiff, it would be answerable in damages for any unnecessary force or violence inflicted upon him by its agents acting within the scope of their authority. The trial court did not err in overruling the demurrer to the second count.

The third count of the complaint was not subject to the demurrer interposed thereto. *Sou. Ry. Co. v. Burgess*, 143 Ala. 364, 42 South. 35.

The second plea attempted to justify the ejection of the plaintiff, but failed to set up any rule of the defendant, and the demurrer thereto was properly sustained.

The plaintiff's replications, in effect, concede the reasonableness of the rule, but attempt to set up a state of facts forbidding the enforcement of same, and which we deem insufficient to authorize a relaxation of said rule. If the facts were as set out in the replication, the plaintiff doubtless had his recourse for a breach of the contract, or of duty growing out of same; but the breach of the contract by the defendant, or a duty growing out of same,

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did not authorize the plaintiff to take passage in another car, controlled by another conductor, and continue the journey without paying the new fare demanded by the conductor, after informing him of the rule. *Lasker v. Third Ave. Co.*, 27 Misc. Rep. 824, 57 N. Y. Sup. 395; *Gravill v. Manhattan R. R. Co.*, 105 N. Y. 525, 12 N. E. 51, 59 Am. Rep. 516.

The trial court erred in overruling the demurrers to the replications to pleas 3 and 4, and the judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and HARALSON, DOWDELL, SIMPSON, and DENSON, JJ., concur.

ST. LOUIS, I. M. & S. RY. CO. v. CITIZENS' BANK OF LITTLE ROCK.

(Supreme Court of Arkansas, June 29, 1908.)

[112 S. W. Rep. 154.]

Carriers—Bills of Lading—Freight—Wrongful Delivery.—Defendant carrier transported certain cotton under bills of lading consigned to the shippers' order, with directions to notify a cotton company. On arrival of the cotton at destination, the carrier delivered it to a compress company, as a warehouseman, and the bills of lading, with drafts attached thereto, were delivered to plaintiff bank, which paid the drafts and charged the amount to the cotton company, holding the bills of lading as collateral. Plaintiff thereafter intrusted the cotton company with the bills of lading whenever it desired to replace them with the compress receipts or other bills of lading for outgoing cotton, and in some instances, where compress receipts were not returned for all the cotton called for in the bill of lading, the bill would be indorsed by the compress company and returned to stand for the bales not called for by the corresponding warehouse receipts. In some manner, through the fraud of the cotton company, defendant carrier was induced to ship out cotton represented by these remnants of the bills of lading, without any credit being given on the bills, and without any satisfaction of the bank's claim thereon. Held, that the bank was entitled to recover from the carrier for such cotton as it held bills of lading not exchanged for warehouse receipts.

Same—Acts of Warehousemen.—Where a carrier, having shipped cotton under order bills, delivered the same to a compress company at destination as a warehouseman, the compress company became the agent of the carrier to take up the carrier's bills of lading, and issue warehouse receipts therefor.

Same—"Duebill."—A "duebill" issued by a carrier in lieu of a bill of lading for cotton, representing the excess of cotton called for by

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an incoming bill of lading on the issuance of an outgoing bill for a smaller number of bales, could not be regarded as a bill of lading.

Same—"Bill of Lading."*—A "bill of lading" has a twofold aspect. It is both a receipt and a contract. As a receipt, it is prima facie and not conclusive evidence of the facts recited, and between the parties is impeachable for mistake, error, or false statements therein.

Same—Authority of Agents—Receipt of Goods.†—It is not within the scope of the authority of the agents of a carrier to issue bills of lading for goods not actually received.

Same—Statutes.—Under the express provisions of Kirby's Dig. §§ 524, 532, neither a carrier nor a warehouseman can issue any receipt for goods not actually received into the possession of the carrier or warehouseman.

Same—Delivery to Carrier.‡—A delivery of goods to a carrier must be for immediate transportation, and, if they are delivered to be stored for a specified time, or until the happening of a certain event, or until further orders, the carrier is a mere depositary, or bailee, and his liability is measured by the principles governing that relation, and not by those relating to carriers.

Same—Bills of Lading—Statutes.—Kirby's Dig. § 530, providing that bills of lading for goods actually deposited shall be transferable by indorsement, and that the transferee shall be deemed the owner of the goods, makes a bill of lading representative, so far as the delivery is concerned, of the commodity itself.

Same—Duebill.—Where a bill of lading for cotton, assigned to plaintiff bank, was surrendered for compress receipts to a compress company to which the railroad company had delivered the cotton at destination, and the railroad company thereafter issued a duebill for the balance of the cotton called for by the compress receipt, on issuing an outgoing bill for a portion thereof, which duebill merely called for the return of 12 bales, which the railroad company never received, such duebill was a mere promise to issue a bill of lading which was beyond the scope of the authority of the agent making it; and hence the carrier was not liable thereon.

Same—Estoppel.—Where a bill of lading for cotton delivered by a carrier to a compress company had been surrendered for compress

*See second foot-note appended to *Pittsburg, etc., R. Co. v. American Tobacco Co. (Ky.)*, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586.

†For the authorities in this series on the subject of the implied authority of a railroad's freight or ticket agents, see foot-note appended to *Albright v. Atchison, etc., Ry. Co. (Iowa)*, 28 R. R. R. 340, 51 Am. & Eng. R. Cas., N. S., 340; foot-note appended to *Illinois Cent. R. Co. v. Jennings (Ill.)*, 27 R. R. R. 91, 50 Am. & Eng. R. Cas., N. S., 91.

‡See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176; first foot-note appended to *Southern Ry. Co. v. Smith (Ky.)*, 25 R. R. R. 652, 48 Am. & Eng. R. Cas., N. S., 652; first foot-note appended to *Pittsburg, etc., R. Co. v. American Tobacco Co. (Ky.)*, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586; *Garner v. St. Louis, etc., Ry. (Ark.)*, 25 R. R. R. 527, 48 Am. & Eng. R. Cas., N. S., 527.

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receipts, and such receipts for a duebill issued by the carrier's agent without authority, and the carrier was induced to ship out the cotton on other orders through error or fraud, it was not estopped to deny that it ever received the cotton pursuant to the duebill.

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action by the Citizens' Bank of Little Rock against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

T. M. Mehaffy and J. E. Williams, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HILL, C. J. This is another chapter in the financial career of the Alphin Lake Cotton Company. It is an action brought by the Citizens' Bank of Little Rock to recover of the St. Louis, Iron Mountain & Southern Railway Company the value of cotton delivered by it to the cotton company without a surrender of the bills of lading representing said bales. There are 13 counts in the complaint, the first 12 counts for 62 bales, and the thirteenth count for 12 bales. The latter will be considered separately, as it presents a different question.

The transactions involving the loss to the bank of the 62 bales of cotton set forth in the 12 counts were as follows: Various shipments of cotton were made to the Alphin Lake Cotton Company in the same method as those described in *Ark. So. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522; that is to say, the shipper delivered the cotton to the railroad company and took a bill of lading consigned to shipper's order. Usually it was in care of the compress company in Little Rock, with directions to notify the Alphin Lake Cotton Company. In all cases the cotton was delivered to the compress company. The bills of lading for said cotton had been attached to drafts drawn upon the Alphin Lake Cotton Company by the shipper, and these drafts were paid by the bank and the amount thereof charged to the Alphin Lake Cotton Company, and the bills of lading held by the bank as security for the advance thus made to the Alphin Lake Cotton Company. The method pursued by the railroad companies, the compress companies, and banks in Little Rock in handling cotton, through which was made possible the success of the schemes of the Alphin Lake Cotton Company, was fully stated in *Citizens' Bank v. Ark. Comp. Co.*, 80 Ark. 601, 96 S. W. 99, 117 Am. St. Rep. 102. The evidence in this case as to the cotton customs is the same as in that case. The bank intrusted the Alphin Lake Cotton Company with the bills of lading whenever the cotton company desired to replace them with compress receipts (or other bills of lading for outgoing cotton); and in lieu

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of the bills of lading thus intrusted to the cotton company would be returned compress receipts, or, in some instances where compress receipts were not returned for all of the cotton called for in the bill of lading, there would be an indorsement made upon the bill of lading by the compress company that certain bales of cotton had been received on transfer receipt, the number of which was given, and the bill of lading would be returned and stand good for the bales not called for by the warehouse receipt. For instance, a bill of lading for 40 bales contained an indorsement showing that for 34 of the bales transfer receipts had been issued, which would leave the bill of lading to stand for the 6 bales for which compress receipts were not issued. In some way, not explained in the evidence, the cotton company got the railroad company to ship out cotton that was represented by these remnants of the bills of lading, and in three instances where there had been no credit upon the bills of lading. The bank sued for the 13 bales represented by the three uncredited bills of lading, and for 49 bales represented by bills of lading upon which credits had been indorsed, reducing them to that number of bales, which bills originally called for many more bales than the 49 which were the remnants. There can be no doubt of the right of the bank to recover for the 13 bales of cotton for which it held bills of lading, and which it had not temporarily surrendered for exchange for warehouse receipts, as the decision in *Ark. So. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522, settles every possible phase of the controversy over them. See, also, *Ark. So. Ry. Co. v. German Nat. Bank*, 207 U. S. 270, 28 Sup. Ct. 78, 52 L. Ed. —, where an interesting review of that case may be found. There can be no distinction worked out between the actions based on the remnants of the bills of lading and those based on the bills of lading as originally received by the bank. The compress company became the agent of the railroad company for the purpose of taking up its bills of lading and issuing therefor warehouse receipts. Where all of the cotton had not been received by the compress company when the bill of lading was presented to it, or for some other reason, the compress company only issued its receipts for a part of the cotton called for in the bill of lading, and it then indorsed upon the bill of lading a credit for the amount which had been taken up by these receipts and left the bill of lading outstanding for the bales not called for by the receipt, and this bill of lading was returned to the bank in that condition and held by it as security for the bales of cotton for which it did not get warehouse receipts, and warehouse receipts took the place of the balance originally called for by the bill of lading, and were noted on the bill of lading. When the cotton company received a bill of lading from the bank for the purpose of getting compress receipts in lieu thereof, it was acting as agent for the bank; and, had this loss occurred through its conduct while

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so acting for the bank, then the bank could not recover herein. But such is not the case; for in every instance where the cotton company was intrusted with the bill of lading the same was returned, or compress receipts for the bales called for in it in lieu thereof, or, where credits were made, compress receipts were returned for the amount thus credited; and these matters were checked up by the bank every day, and no shortage was found in this respect. Therefore it is clear that the limited agency of the cotton company for the bank did not cause the loss herein sued upon.

It was also shown that of the 62 bales that were shipped out by the railroad company without the surrender of bills of lading the proceeds of 46 of them went to the Citizens' Bank, the plaintiff in this case. In each of these instances, however, the proceeds went to the bank through collecting a draft attached to an outgoing bill of lading, which bill of lading had been obtained by the surrender of a warehouse receipt which had been taken out of the bank for the purpose of being exchanged for the said outgoing bill of lading, and the draft was placed to the credit of the cotton company when drawn by the cotton company with said outgoing bill of lading attached; and in this way the bank paid twice for one bale of cotton, and received the proceeds thereof from it when the draft attached to the outgoing bill of lading was paid, but left it unpaid for its first advancement when it paid the draft attached to the incoming bill of lading. There was nothing in the evidence that showed that the bank knew that the cotton was being thus manipulated. So far as the 62 bales of cotton represented by the unsurrendered bills of lading and the remnants of bills of lading are concerned, there are no facts to take the case without the principles governing in *Ark. So. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 92 S. W. 522, and to this extent the judgment is affirmed. The facts in regard to the 12 bales of cotton are as follows: The compress company was in the habit of issuing one receipt for several bales of cotton, instead of issuing separate receipts for each bale of cotton, and would issue a receipt for as many bales as would be called for by the bill of lading. In shipping out cotton it was necessary, under the custom then prevailing, to get a turn-out order for the bales to be shipped and to get a compress receipt for an equal number of bales to those called for by the turn-out order. In order that the cotton company might make a shipment, the bank delivered to it, for the purpose of obtaining an outgoing bill of lading, a certain compress receipt calling for a large number of bales of cotton. The cotton company did not ship out all of the cotton called for by said compress receipt, but delivered the compress receipt to the railroad company and got an outgoing bill of lading for 12 bales less than the amount called for by said receipt, and returned the

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outgoing bill of lading to the bank, and for the 12 bales called for by the receipt not in the bill of lading delivered to the bank a certain receipt, or "duebill," as it was called (which term for the want of a better will be adopted), issued under authority of Mr. A. R. Bragg, division freight agent of the railroad company. This receipt or duebill was as follows: "No. 1, return 12 bales, account Alphin-Lake, Bill of Lading 379, A. R. B. 11-15-02." This was written by Mr. G. W. Swain, who was bill of lading clerk under Mr. Bragg, and who was empowered by Mr. Bragg to issue such an instrument. There was a custom existing in the division freight office of issuing bills of lading for compress receipts; and, where the compress receipts called for more cotton than the shipper desired to ship out, the receipt was surrendered, and the freight office would execute a duebill for the excess in the number called for in the compress receipt. These duebills were accepted by the railroad company the same as compress receipts. This custom prevailed in Little Rock, but was not shown to extend beyond it, or that it was known to any officials of the railroad other than the local ones.

The facts showed here, as they did in the case of Citizens' Bank v. Ark. Comp. Co., 80 Ark. 601, 96 S. W. 997, 117 Am. St. Rep. 102, that the compressed receipts were not relied upon to identify particular bales. They represented merely so many bales of cotton, and the identification of the cotton was furnished by the turn-out order. The procedure was thus explained by Mr. Justice Riddick: "When he [Lake] desired to ship any cotton held by the compress company, he obtained from the bank receipts for the number of bales he desired to ship, and the compress company would then ship the cotton out on his 'turn-out' order upon his surrendering receipts for an equal number of bales, without regard to whether these receipts had been issued or assigned to him or not; for, prior to this litigation, the receipts which the compress company gave for the cotton contained only a meager description of the cotton, and cotton standing on the books of the warehouse to the credit of one person would be shipped out on the order of such person upon his surrendering receipts issued to him or to any other person for a like number of bales. In other words, the compress company, the banks, and cotton dealers dealt with these compress receipts as if they called for no particular cotton, but only for a certain number of bales of cotton." The testimony shows that the railroad officials redeemed their duebills by issuing a bill of lading for them, just as they would issue a bill of lading for a compress receipt; the identity of the cotton for which the bill of lading was issued not depending in either instance upon the compress receipt (or duebill) itself, but it took both the receipt (or duebill) and the turn-out order to identify the cotton shipped. The bank accepted and retained this duebill in lieu of compress receipts, and now

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sues the railroad company upon it. Can it recover upon it? It is not a bill of lading. A bill of lading has a twofold aspect. It is both a receipt and a contract. 1 Hutchinson on Carriers, § 157; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998. As a receipt, it is prima facie and not conclusive evidence of the facts recited, and between the parties it is impeachable for mistake, error, or false statements in it. 1 Hutchinson on Carriers, § 158. A carrier acts through agents, and is bound by all they do within the scope of their authority; and it is within the scope of their authority to receive goods and issue bills of lading therefor, but it is not within the scope of their authority to issue bills of lading when the goods are not received. 1 Hutchinson on Carriers, §§ 159-162. The statute forbids any warehouseman or carrier to issue any receipt for goods unless the goods shall have been actually received into its possession. Kirby's Dig. §§ 524, 532. A delivery of goods to a carrier must be for immediate transportation. If goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until further orders, the carrier becomes a mere depositary or bailee, and his liability only measured by the principles governing that relation, and not as a carrier. 1 Hutchinson on Carriers, § 112, and cases in note 23. Section 530 of Kirby's Digest makes warehouse receipts given by warehousemen for cotton or other commodities, when stored or deposited, and bills of lading or transportation receipts given by carriers, transferable by indorsement, and all persons to whom the same shall be transferred shall be deemed to be the owner of such goods, and the goods shall not be delivered except upon surrender of such warehouse receipt. This section, and others in chapter 15, make the warehouse receipt or bill of lading representative, so far as delivery goes, of the commodity itself, and guards and protects the value of such evidence of the commodity by requiring the actual delivery of the commodity before the issuance of the receipt and forbidding the delivery of the commodity without the surrender of the evidence of it. The Legislature of 1907 provided for giving bonds pending the transmission of a bill of lading, which is but another emphasis of the protection which the law affords these evidences of property.

An application of the principles above announced to the facts at bar brings this conclusion: It was beyond the scope of the freight agent's authority, and contrary to law, to issue a bill of lading or receipt for goods not actually received, and such receipt is not binding, at least before the right of a bona fide holder of a negotiable bill of lading intervenes, upon the carrier. There was no cotton actually delivered to the railroad when Mr. Bragg issued the duebill sued on. If the compress receipt which was surrendered when the duebill was issued be taken as an actual delivery of the cotton, yet it was not delivered

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for immediate shipment, but merely to be held until some further orders were received for it to be shipped out; and in the meantime the railroad company was merely a depositary, and liable only as such for the safe-keeping; and in this instance there was nothing to keep safely other than a mere symbol of the property itself. This symbol was an incomplete one, as the custom required another instrument to identify the cotton in order that the proper bill of lading could be issued therefor. The bank permitted its compress receipt, which represented so many bales of cotton—indeterminate, it is true, but still a given number of bales of cotton in a warehouse—to be surrendered, and accepted in lieu thereof this duebill. The duebill represented nothing tangible. It is a promise to issue a bill of lading, and such a promise is beyond the scope of authority of the agent making it. It is a mere symbol for another symbol. It cannot be binding upon the railroad as a receipt, for no goods were received. It is not a bill of lading, and the statute relating to them cannot apply. It is a promise to give a bill of lading for 12 bales of cotton because the carrier holds a compress receipt for 12 bales, but the carrier's agent cannot bind the carrier by a bill of lading until the goods are actually delivered for immediate shipment. In no view of it is it a binding obligation of the railroad company. It is said by the appellee that it makes no difference whether Bragg had authority to issue the duebill or not, since the railroad actually got the cotton sued for. They invoke the doctrine of estoppel against a corporation pleading an ultra vires act when it has received the consideration for the act, when it is an executed contract. The railroad received this cotton for transportation only, and did not take it as its own, and did not receive any benefit other than its freight tolls. It was through some error or rashness that the railroad company was induced to ship it out without surrender of the bill of lading or compress receipt representing it, and that is the foundation of the claim against it. But, as the bill of lading had been surrendered for compress receipts and compress receipts for this duebill, liability cannot be sustained on such ground, but must rest upon the duebill alone. The railroad company, like the bank, is an innocent victim of the machinations of the Alphin Lake Cotton Company. This is conceded to be a case in which one of two innocent parties must suffer for the misdeeds of a "daring financial buchaner," and the doctrine invoked is wholly foreign to the issues.

The judgment in favor of the bank for the value of the cotton sued for in the first 12 counts is affirmed, and the judgment in favor of the bank for the value of the 12 bales sued for in the thirteenth count is reversed, and judgment entered here for the proper sum.

HART, J., having presided in the chancery court, was disqualified, and did not participate herein.

LA BARGE *v.* UNION ELECTRIC CO.

(Supreme Court of Iowa, June 10, 1908.)

[116 N. W. Rep. 816.]

Carriers—Street Railroads — Operation — Construction of Parallel Tracks—Negligence—Evidence.—To lay parallel street railroad tracks so close together that the space between open passenger cars operated thereon is very narrow, is evidence of negligence.

Same—Care of Passengers—Duty of Road.*—Where a street railway loads its cars so as to fill the standing room inside and the footboard outside, care of the passengers' safety must be proportionate to the dangers to which they are exposed.

Same—Contributory Negligence.†—The slight exposure of a passenger's hand, arm, or head outside of a car window or doorway is not necessarily an act of negligence.

Same — Injuries to Passengers — Contributory Negligence — Questions for Jury.†—The seats on defendant street railway company's car extended transversely, leaving no passageway down the middle, the passengers entering the space between the seats directly from the footboard on the outside of the car. The sides of the car were not inclosed, except by upright posts erected at the ends of the seats. On the outside of these posts were attached perpendicular handholds for the convenience of passengers in getting on or off. While moving, a rail or guard was let down on the left side of the car, about 3 feet above the floor, and with the upright posts constituted the only barrier on that side. The space between two cars standing at rest on the tracks was about 11 inches, but the tracks were uneven, the rails being depressed at the joints, thus permitting the cars when in motion to rock and sway, thereby reducing the space between them. Plaintiff's intestate, a passenger, gave the end seat, which he occupied to a lady, the car being crowded, and stood with his back against the guard rail and post, and on throwing back his head in laughter, so that it extended a few inches beyond the post, was struck by the post or handrail of a car moving rapidly in the opposite direction, and fatally injured. Held, that the question of decedent's contributory negligence was for the jury.

*See note, 4 R. R. R. 536, 27 Am. & Eng. R. Cas., N. S., 536; note, 3 R. R. R. 525, 26 Am. & Eng. R. Cas., N. S., 525; note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217.

†See last foot-note appended to *Hewes v. Chicago, etc., R. Co.* (Ill.), 21 R. R. R. 755, 44 Am. & Eng. R. Cas., N. S., 755; last foot-note appended to *Interurban Ry. & Term. Co. v. Hancock* (Ohio), 21 R. R. R. 439, 44 Am. & Eng. R. Cas., N. S., 439; foot-note appended to *Huber v. Cedar Rapids, etc., Ry. Co.* (Iowa), 12 R. R. R. 768, 35 Am. & Eng. R. Cas., N. S., 768, where all the authorities on the subject in this series, preceding it, are collected or referred to.

La Barge v. Union Electric Co

Appeal from District Court, Dubuque County; M. C. Matthews, Judge.

Action at law to recover damages for the death of plaintiff's intestate, alleged to have been killed by reason of the negligence of the defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Hurd, Lenchan & Kiesel and *Matthews & Frantzen*, for appellant.

T. J. Fitzpatrick and *M. J. Wade*, for appellee.

WEAVER, J. The appellant owns and operates a double track electric street railway, at the place where the accident occurred, in the city of Dubuque, Iowa. On July 13, 1902, August La Barge was a passenger on an open or summer car moving north along the east track on Couler avenue. The car seats extended transversely, leaving no aisle or passageway down the middle, the passengers entering the space between the seats directly from the footboard extending along the side of the car. The sides of the car were not inclosed, except by upright posts erected at the ends of the seats. On the outside of these posts there were attached perpendicular handholds or bars for the convenience of passengers in boarding or alighting from the car. While moving northward, a hinged or movable rail or guard was let down on the left side of the car, requiring passengers to enter and depart from the east footboard, and thus avoid danger of collision with cars moving south on the west track. This rail or guard when in place was a little less than 3 feet above the car floor, and with the posts above described constituted the only barrier or inclosure on that side. The deceased entered the car from the east side, and sat down at the west end of one of the seats. Shortly afterward, the car being full to crowding, deceased arose, and, giving his seat to a lady, stood up in the narrow space in front of the place where he had been sitting. Standing there with his back to the west, he appeared to be supporting or steadying himself against the guard rail and post, talking with some of his fellow passengers. In the course of the conversation something of an amusing nature was said or done, and deceased in the act of laughing threw his head back so that it extended a few inches beyond the outside of the post near which he was standing. At the instant of this movement on his part he was struck upon the head by the post or handrail of another car moving rapidly southward on the west track, and fatally injured. The plaintiff charges the defendant with negligence in constructing its two tracks so close together that the cars moving thereon in an opposite direction would be separated by a space of very few inches, thereby exposing passengers to great danger of injury, especially when the cars were being operated at high speed. Other allegations of negligence were made, but not submitted to the jury by

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the trial court, and we need not here set them out. The jury returned a verdict for plaintiff, assessing damages in the sum of \$3,000.

The appellant in argument rests its demand for a reversal on the single proposition that, upon the admitted and undisputed facts, the plaintiff was not entitled to recover, and the jury should have been so instructed. As this position taken by the appellant requires us to assume the truth of all matters which the plaintiff's evidence fairly tended to establish, we may say that, in addition to the facts hereinbefore stated, it was shown that the two tracks of the appellant's road at the place of the accident are in such proximity that, with two cars standing thereon at rest, the distance between them would be about 11 inches. The tracks were somewhat uneven, the rails being depressed at the joints, and while this fact was not submitted to the jury as a ground of negligence, we think it is still a proper matter to be considered, as bearing upon the question whether the tracks were too close together to be operated with safety. It is a matter of common observation that car bodies, owing to their weight, size, and manner of construction, have some tendency to rock and sway upon their trucks while in rapid motion, and that such tendency becomes more marked upon tracks which are rough or uneven. The testimony of the several witnesses of the accident is to the effect that at the time the deceased was struck his head was thrown back not to exceed a distance of 3 inches to 6 inches from the outer edge of the post by which he stood, and if this be true, it would seem to indicate that in passing the two cars so swayed or rocked inward that the space between them was reduced to a very narrow margin. That it is evidence of negligence to construct parallel tracks so close together for the operation thereon of open cars packed to their capacity with passengers ought to need no argument. To the passenger standing or sitting at the end of the seat in a crowded car the open side is a constant invitation to lean in that direction for breathing room, and for relief from the pressure to which he is subjected; and for the court to say that the railroad company owes no duty to guard the safety of a passenger who happens to reach his hand a few inches beyond the frame of the car, or of one who, while standing because of the crowded condition of the vehicle, voluntarily or involuntarily, permits any portion of his person to be exposed slightly beyond the post, would be to ignore the fundamental rule of the law of carriers, which requires active, vigilant, and constant care for the safety of those whom they undertake to transport over their lines. Living people cannot be packed into cars like bales of merchandise. Life presupposes motion, movement, and some reasonable degree of freedom of action, and those who cater to the public by furnishing means of carriage from place to place for hire must provide facilities and pro-

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tection with these self-evident facts in view. Whether the lines of a double track street railway are separated by a safe distance depends, in some degree, on the manner in which the cars are to be operated thereon. If intended for rapid transit, the tendency of the cars to sway or lurch from side to side, thereby reducing the distance separating them in passing, is a factor which cannot be safely overlooked, and failure to guard against such danger by increasing the space between the tracks, or employing other suitable devices to shield the passengers therefrom, is culpable negligence. But counsel insist with much earnestness that, in any event, the deceased was chargeable with contributory negligence as a matter of law. We think otherwise. There was no negligence in yielding his seat to another passenger. The company having filled the seats with other passengers, he was not negligent in standing up. There being no aisle in the center of the car, the only place to stand was at the outer end of the space in front of the seat or upon the footboard along the outside of the car. To uphold the appellant's contention is to say that the voluntary or involuntary act of the deceased in throwing his head backward in laughter slightly beyond the post against which he was standing was negligence as a matter of law, and that in so doing he did not act as a reasonably prudent man might fairly have been expected to act under the circumstances. In our judgment his conduct was not so glaringly imprudent that the jury might not fairly and reasonably acquit him of culpable negligence. No well-considered authority called to our attention supports the appellant's view in this respect, or holds the passenger to such extraordinary circumspection of conduct in order to claim protection at the hands of the carrier. It is a common and not necessarily an improper thing for street railway companies to load their cars, not only to the limit of seating capacity, but to fill the standing room inside and the footboards outside. This is often unavoidable, but the movement of cars and the handling of traffic must be so controlled and guarded as not to expose persons thus being carried to unnecessary or unreasonable danger. In other words, if the carrier exercises the right to carry passengers in this manner, care of their safety must be proportionate to the dangers to which they are exposed. *Treat v. Railway Co.*, 131 Mass. 371; *Griffith v. Railroad Co.*, 63 Hun, 626, 17 N. Y. Supp. 692; *Clark v. Railroad Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Geitz v. Railroad*, 72 Wis. 310, 39 N. W. 866; *Lehr v. Railroad*, 118 N. Y. 556, 23 N. E. 889; *Meesel v. Railroad*, 8 Allen (Mass.) 234.

A passenger, sitting by a car window, rested his arm on the sill, his elbow projecting a few inches beyond the side of the car, and was struck and injured by another car moving on the adjoining track. Held that the question of his contributory negligence was for the jury. *Summers v. R. R. Co.*, 34 La. Ann.

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139, 44 Am. Rep. 419. And it has often been held that the slight exposure of a passenger's hand, arm, or head outside of a car window or doorway is not necessarily an act of negligence. *Salmon v. Railroad*, 124 Ga. 1056, 53 S. E. 575; *Railroad v. Brophy*, 105 Pa. 38; *Dahlberg v. Railroad*, 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585; *R. R. Co. v. McCleave* (Ky.) 38 S. W. 1055; *Francis v. N. Y. S. Co.*, 114 N. Y. 380, 21 N. E. 988.

The contrary rule would be manifestly unreasonable and unjust. We think it unnecessary to go into a more extended review of the authorities cited by counsel. The conclusion we have announced is in harmony with the general principles of the law governing carriers of passengers as the same has, from time to time, been applied by this court.

It is sufficient to say that in our judgment there was sufficient evidence to justify the trial court in refusing to direct a verdict in defendant's favor, and as this is the only question argued by counsel, the judgment appealed from must be and it is affirmed.

GULF, C. & S. F. RY. CO. v. OVERTON.

(Supreme Court of Texas, May 20, 1908.)

[110 S. W. Rep. 736.]

Damages—Mental Suffering.*—Mental suffering by one, due to the negligent treatment by a carrier of her invalid sister while both were passengers, does not constitute a ground of recovery, where she was not a party to the contract for carrying her sister, and the carrier did not, by undertaking to transport her sister, place itself under any duty to her.

Carriers—Injury to Passenger—Damages.—A passenger may recover for inconvenience and injury due to a failure of the carrier to exercise that degree of care towards her that is due a passenger.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by Mrs. Ellis Overton against the Gulf, Colorado & Santa Fe Railway Company. From a judgment of the Court of Civil Appeals (107 S. W. 71) affirming a judgment of the district court for plaintiff, defendant brings error. Judgment of the Court of Civil Appeals and of the district court reversed, and cause remanded.

*For the authorities in this series on the subject of the right to recover for mental suffering, see last foot-note appended to *Taylor v. Atlantic Coast Line R. Co.* (S. Car.), 28 R. R. R. 774, 51 Am. & Eng. R. Cas., N. S., 774; last foot-note appended to *St. Louis, etc., Ry. Co. v. Leamons* (Ark.), 27 R. R. R. 744, 50 Am. & Eng. R. Cas., N. S., 744; foot-note appended to *St. Louis, etc., Ry. Co. v. Taylor* (Ark.), 27 R. R. R. 738, 50 Am. & Eng. R. Cas., N. S., 738.

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Terry, Cavin & Mills, Brown & Lomax, and Chas. K. Lee,
for plaintiff in error.

S. C. Padelford and D. W. Odell, for defendant in error.

BROWN, J. The honorable Court of Civil Appeals refers for a statement of the facts in this case to *Gulf, C. & S. F. Ry. Co. v. Coopwood* (Tex. Civ. App.) 96 S. W. 102, and from the facts stated in that case we make the following condensed statement: Mrs. M. J. Coopwood was a widow whose family consisted of an unmarried daughter, Miss Minnie, a granddaughter, and the appellee, who was a widow and resided with her mother. Mrs. Coopwood, with the members of her family, were on their way to San Angelo with Miss Minnie, who was quite sick, and when they arrived at the depot of the plaintiff in error in Brownwood Miss Minnie was placed in a chair, she being unable to walk. Mrs. Coopwood purchased tickets for all of the party from Brownwood to San Angelo, and paid the regular fare therefor. When the train arrived at Brownwood the porter and brakeman came into the depot, and Mrs. Coopwood explained to them that her daughter was unable to walk, and requested them to carry her into the car, which they agreed to do. About this time Mrs. Overton stated in the presence of the conductor and the porter that she would go on to the train and secure a seat for her sister. "The porter and brakeman picked up the chair Miss Minnie Coopwood was on and carried her out towards the engine and baggage car, with the intention of putting her in the baggage car. Miss Minnie Coopwood asked them not to put her in the baggage car, and cried out to her mother to stop the porter and brakeman and not let them put her in the baggage car. Mrs. Coopwood called to them and asked them not to put her daughter in the baggage car, but they proceeded towards the baggage car, and said that was the place for her if she was sick. Miss Minnie Coopwood begged not to be put in the baggage car, and about this time some man, a stranger, walked up and told the porter and brakeman to stop and not put her in the baggage car, to which one of them replied, 'Boss, there ain't enough room in the other car for her,' and the stranger remarked, 'Make the passengers make room for her.' Miss Minnie was then put into a day coach, where she remained in the care of her mother until San Angelo was reached. Shortly before the train got to San Angelo Mrs. Coopwood told the conductor that she wanted him to help them off just as soon as the depot was reached, and the conductor said he would when he got through helping the other passengers off the train. As the train was running into San Angelo Miss Coopwood said to the conductor: 'Please help me off now. I am very sick and suffering.' And Mrs. Coopwood also called to him before he got to the car door and asked him to help them off. To which the conductor made no reply, or, if so, it was not heard by Mrs. Coopwood. When the train stopped

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at San Angelo, and while the conductor was assisting other passengers off, Mrs. Coopwood asked him to help her daughter off the train, that she was suffering excruciating pain in her lungs, and that she wanted to get her to a house where she could have her taken care of and give her medical aid. The conductor said that when he got through helping the passengers off he would help her off; but, according to Mrs. Coopwood's statement, she did not see him any more, and after all the passengers were off the train except herself and daughters the brakeman came in the coach, and said the conductor had gone home and the train would have to be switched down into the yards. After this a negro porter came in the car, and she asked him to tell the conductor to help them off the train, and he made no reply, but shut the door and left. John Abney, a coach cleaner in the employ of appellant, with whom Mrs. Coopwood was acquainted, next came into the car, and he said they would have to switch the coach off of that track. The coaches were then switched down into the yards probably 100 yards distant from the depot, and John Abney ordered a carriage, and Mrs. Coopwood and her daughters were put in it, and they left, seeking a hotel. The principal hotel of San Angelo had been previously burned, a fact known to appellant's conductor at this time. The passengers who disembarked from the train before Mrs. Coopwood and daughters, who were able to do so, had secured lodging in the hotels, and Mrs. Coopwood and her daughters were compelled to drive to three different places before accommodations could be secured. Mrs. Coopwood and her daughters remained in the car after the train reached San Angelo before they secured a carriage and left it probably a half hour or longer. She and her daughter Mrs. Overton were physically unable to carry Miss Coopwood on and off the train, and this fact, as well also as the helpless condition of Miss Coopwood, was well known to appellant's conductor and other employees in charge of the train upon which they were traveling." This suit was brought "to recover of the defendant damages for the physical and mental suffering sustained by Mrs. Overton on account of the alleged wrongful and negligent conduct of the servants in control of one of appellant's passenger trains upon which she was a passenger at the time of its arrival at Brownwood and thereafter at the town of San Angelo. She also in addition seeks to recover for mental suffering sustained by her on account of the alleged negligent and wrongful treatment of her invalid sister who was partially in her charge and also in the charge of her mother, Mrs. Coopwood, when passengers at Brownwood and at San Angelo." The case was tried before a jury, and a verdict and judgment rendered in favor of the appellee for the sum of \$500.

In his work on personal injuries Mr. Watson states the general rule governing this class of cases thus: "There can be no

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recovery for such mental suffering as merely results from sympathy for another's mental or physical pain, the right of action in such cases being restricted to the person who has directly sustained the injury." Watson on Damages and Personal Injuries, § 406; Western Union Tel. Co. v. Cooper, 71 Tex. 512, 9 S. W. 398, 1 L. R. A. 728, 10 Am. St. Rep. 772. There are numerous exceptions to the general rule stated above, but the facts as found by the Court of Civil Appeals do not bring this case within any one of the exceptions. Mrs. Overton was not a party to the contract for carrying Miss Minnie Coopwood, nor did the railroad company, by undertaking to transport the sister, place itself under any duty to Mrs. Overton, and there can be no negligence as to Mrs. Overton, unless there was some duty which was due from the company to her. The honorable Court of Civil Appeals rested its decision upon the case of Gulf, C. & S. F. Ry. Co. v. Coopwood, which was a companion case to this. The application for writ of error in that case was denied because Mrs. Coopwood was the mother of the injured party, and in control of her at the time, and in exercising that control entered into a contract with the railroad company for the transportation of her invalid daughter from Brownwood to San Angelo. The acts of the employees of the railroad company and its negligence towards Miss Minnie was a direct violation of the contract with the mother. Therefore this court held, in acting upon the application, that the railroad company owed to Mrs. Coopwood the duty to carry her daughter to San Angelo with that care which was due to a passenger. Mrs. Coopwood's injury resulted from a violation of this contract and a failure to perform that duty.

There is evidence which tends to show that Mrs. Overton suffered some inconvenience and injury from the failure of the railroad company and its employees to exercise that degree of care towards her that was due to a passenger, and for such injury she is entitled to recover. It is therefore ordered that the judgment of the Court of Civil Appeals and of the district court be reversed, and that this cause be remanded to the district court for trial in accordance with this opinion.

PITTSBURGH, C., C. & ST. L. RY. CO. *v.* SCHEPMAN.

(Supreme Court of Indiana, June 5, 1908.)

• [84 N. E. Rep. 988.]

Negligence—Actions—Pleading — Allegations of Negligence.*—In common-law actions founded on negligence the negligence relied on, whether of commission or omission, must be averred in direct and positive terms, or such a state of facts set forth as will, in the usual course of things, to a certainty compel the presumption that the injury sued for was the result of defendant's negligence.

Carriers—Carriage of Passengers — Negligence — Failure to Vestibule Cars.†—A carrier is not required by law to vestibule its passenger trains, or any class of its cars, and a failure to do so is not of itself negligence.

Same—Questions for Jury—Negligence.—Where a carrier operates a train advertised as completely vestibuled in whole or in part not vestibuled, a passenger, reasonably believing from the advertisement that the train is vestibuled, and relying on that fact, and thereby induced to attempt to pass from one car to another, and injured because of the absence of the vestibule, is entitled to have the question of the carrier's negligence submitted to the jury.

Same—Complaint—Sufficiency.—A complaint in an action for injury to a passenger, who was thrown from a car platform, which did not aver that the carrier was negligent in anything it had done or left undone with reference to vestibuling or failure to vestibule the cars composing the train, and though it averred that the carrier held out the train to the public as vestibuled, did not aver that plaintiff knew that the carrier was so holding out the train when he attempted to pass between the cars, and from which it did not appear that he relied on such holding out or was thereby induced to attempt to pass between cars, and which did not show how long the platform of the car had been without a vestibule, nor that the carrier knew or had cause to know its condition, and which merely averred concerning plaintiff's state of mind before the injury that, believing the platform vestibuled, he crossed the platform of the car he was on and stepped on the platform of the next car, and was thrown therefrom, avers nothing con-

*For the authorities in this series on the subject of pleading negligence, see first foot-note appended to *Harris v. Southern Ry. Co.* (Ga.), 27 R. R. R. 508, 50 Am. & Eng. R. Cas., N. S., 508; first foot-note appended to *Louisville & N. Ry. Co. v. Warfield & Lee* (Ga.), 27 R. R. R. 345, 50 Am. & Eng. R. Cas., N. S., 345; last foot-note appended to *Chicago, etc., Ry. Co. v. McCandish* (Ind.), 26 R. R. R. 502, 49 Am. & Eng. R. Cas., N. S., 502; second foot-note appended to *Creola Lumber Co. v. Mills* (Ala.), 26 R. R. R. 398, 49 Am. & Eng. R. Cas., N. S., 395; first foot-note appended to *Haly v. Missouri Pac. Ry. Co.* (Mo.), 25 R. R. R. 683, 48 Am. & Eng. R. Cas., N. S., 683.

†See note, 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154.

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cerning the vestibules inconsistent with due care by the carrier, and under such averments there is no ground for implied negligence.

Pleading—Conclusion of Pleader.—An averment in an action for injury to a passenger, who was thrown from a car platform, that the carrier held out the train to the public as vestibuled, was in the nature of a conclusion rather than a statement of fact.

Carriers—Injuries to Passenger—Proximate Cause.‡—A passenger injured, not because the train was made up in violation of Burns' Ann. St. 1901, § 5191, forbidding, in the formation of a passenger train, the placing of a baggage car in the rear of a passenger car, but because the baggage car attached to the rear of the passenger car had an open and exposed platform, cannot recover for the negligent and unlawful placing of the baggage car in the rear of the passenger car contrary to section 5191, since that was not the proximate cause of his injury.

Appeal from Circuit Court, Henry County; J. M. Morris, Judge.

Action by George W. Schepman against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appealed to the Appellate Court (82 N. E. 998), whence the cause was appealed to the Supreme Court under Burns' Ann. St. 1908, § 1394, cl. 3. Reversed, with instructions.

John L. Rupe, for appellant.

Shiveley & Shiveley, for appellee.

HADLEY, J. Appellee sued the appellant for the loss of a leg alleged to have been caused by the negligence of the appellant. The complaint is in two paragraphs. It is charged in the first paragraph that appellant owns and operates a railroad running from Indianapolis through Richmond; that on February 27, 1904, appellant operated between said points a passenger train scheduled to leave Indianapolis at 50 minutes after 6 o'clock in the evening of each day, and held out to the public that said train was a complete vestibuled train. At the time scheduled on said day the defendant started a train of cars from Indianapolis to Richmond, made up in the following order: An engine, a number of baggage cars, a day coach, a baggage car and smoker combined, a number of Pullman sleepers, and a dining car. The forward half of the baggage car was used for baggage, and this end of the car was attached to the rear end of the day coach occupied by the plaintiff, the platform of which car, where coupled to said day coach, was 18 inches wide in the center and 6 inches at the sides, and had no guard rails, vestibule, or other protection to prevent passengers passing from said day coach into said combi-

‡For the authorities in this series on the question whether negligence must be the proximate cause of the injury to entitle plaintiff to recover therefor, see foot-note appended to *Florida, etc., Ry. Co. v. Wade* (Fla.), 25 R. R. R. 611, 48 Am. & Eng. R. Cas., N. S., 611.

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nation car from being thrown therefrom, and the same was not lighted. All the other ends, platforms, and spaces between the other cars composing the train were vestibuled and inclosed, thereby enabling passengers to walk from one car to another without any danger of being thrown from the platform of said cars. Defendant, being in Indianapolis, and desiring to return to his home in Richmond, purchased a ticket, and became a passenger on the train. He entered the day coach, and soon thereafter became sick, and by reason of said sickness it became necessary for him to use a water closet. He thereupon walked to the water closet in the rear part of said day coach, and attempted to enter the same, but the door was locked, and he was unable to do so, and, believing that the spaces between all the cars of the train were vestibuled, guarded, and inclosed, he thereupon attempted to pass from said car in which he was riding to the car immediately in the rear thereof in search of a water closet, and when he stepped on the platform of the car immediately in the rear of the passenger coach he was then and there violently hurled and thrown from said platform to the ground by the lurching of the train and injured. When thrown from the train it was running at the rate of 50 miles an hour, over an uneven track, and by reason of its speed and the rough condition of the track the train was rocking and lurching from side to side. The negligence charged is: "That said defendant carelessly, negligently, and wrongfully made up such train by placing said combination car between said passenger coach in which the plaintiff was riding and the Pullman sleepers." It is also alleged that when he attempted to pass into the combination car he had no knowledge of the character and construction of the platform, nor that the same was not vestibuled, guarded, or lighted. "And by reason of the lack of guard rails or vestibuling devices about the platform leading into said combination car from which he was thrown, the lack of lights to enable him to see said negligent, careless, and wrongful arrangement of cars in said train, and the dangerous and high rate of speed at which the train was being operated, the plaintiff was thrown from said train and injured as hereinafter described." The second paragraph of the complaint is not different from the first in any material respect. A demurrer to each paragraph of the complaint was overruled. The defendant answered the general denial and one affirmative paragraph. Trial by jury, verdict and judgment for the plaintiff over a motion for a new trial.

We are called upon to decide whether the facts stated in the complaint constitute a cause of action. In common-law actions founded on negligence the rule is firmly established that the negligence relied on, whether of commission or omission, must be averred in direct and positive terms, or such a state of facts set forth as will, in the usual course of things, to a certainty impel

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the presumption that the injury sued for was the result of the defendant's negligence. *Kentucky Bridge Co. v. Moran*, 169 Ind. 18, 80 N. E. 536; *Laporte Carriage Co. v. Sullender*, 165 Ind. 294, 299, 75 N. E. 277; *Pen. Co. v. Marion*, 104 Ind. 240, 3 N. E. 874; *Railway Co. v. Anderson*, 58 Ind. 413. Applying the rule above stated to the complaint, it cannot be sustained.

The action chiefly rests upon the averment in each paragraph that the defendant "held out to the public that said train was a completely vestibuled train," and that the plaintiff believing the train to be so protected, he attempted to pass from the passenger coach in which he was riding to the car next in the rear over the unlighted platforms of said cars, and was injured by reason of the absence of a vestibule from the forward end of the rear car. A railroad company is not required by law to vestibule its passenger trains, nor any class of its cars, and a failure to do so is not of itself negligence. It is, however, well known that a vestibuled train is less hazardous to one having occasion to pass from one car to another while the train is in motion than one not vestibuled. A company, therefore, should not advertise its train as completely vestibuled, and thereafter operate it in whole or in part as not vestibuled. If it does so, a passenger who shows in his complaint that he reasonably believed from the defendant's advertisements or other notice that the train on which he had passage was vestibuled, and, relying upon the fact, he was thereby induced to attempt to pass from one car into another when the train was running rapidly, and became injured by reason of the absence of a vestibule from an intervening platform, we think should have the question of the defendant's negligence submitted to the jury. But the complaint before us does not exhibit this state of facts. It is not averred in either paragraph that the defendant was guilty of negligence in anything it had done or had left undone with reference to the vestibuling or failure to vestibule the cars composing the train upon which the plaintiff was a passenger. It is not averred that the plaintiff knew that the defendant was holding out to the public that the train was vestibuled when he attempted to pass between the cars; nor does it appear that he relied upon such holding out, or that he was induced thereby to undertake the passage, which he would otherwise not have undertaken. Neither is it shown how long the platform of the car had been without a vestibule; nor that the defendant knew or had cause to know that it was in that condition. The only allegation concerning the plaintiff's state of mind before his injury is as follows: "And, believing that the platform and the space between the cars * * * were fully vestibuled * * * he crossed the platform of the day coach, and, stepping upon the platform of the next car, was violently thrown therefrom to the ground by the lurching of the train." How he reached the belief that the platforms were inclosed, whether from the "holding

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out," or from what he had observed in boarding the train, or from what some fellow passenger had told him, we are not informed. In brief, there is nothing averred in either paragraph concerning the vestibules that is inconsistent with due care on behalf of the defendant. Under such averments there is no ground for implied negligence. Furthermore, the allegation that the defendant "held out to the public that said train was vestibuled" is in the nature of a conclusion rather than a statement of fact. Facts and not conclusions must be pleaded. How is the court to know whether the "holding out" alleged was an existing fact, or a mere personal conclusion of the pleader? And how was it held out? By printed advertisement, by private circular, by verbal representations of its agents, or by usage? When and where was it "held out" is even left to conjecture.

Negligence, however, is directly charged in respect to the making up of the train by "carelessly, negligently, and unlawfully" placing a baggage car immediately in the rear of the passenger car in which the plaintiff was riding, contrary to section 5191, Burn's Ann. St. 1901. This statute forbids, in the formation of a passenger train, the placing of a baggage, freight, merchandise, or lumber car in the rear of a passenger car. It was enacted in 1852 (Rev. St. 1852, p. 420, § 31), when it was generally the custom with railroad companies to form and operate mixed trains composed of passenger and traffic cars so arranged in the train as would be most convenient in dispatching the company's business. The chief purpose of the act doubtless was to diminish the danger of passengers becoming injured in cases of derailment or collision of trains by the momentum of heavily laden rear cars. How far the statute is applicable to modern methods of operating railroads, and whether railroad corporations are amenable to the statute, are questions not necessary to a final disposition of the case, and therefore left undecided.

Assuming that the car immediately in the rear of the passenger coach in which the plaintiff was traveling was a baggage car, we are unable to see how the case could have been different, under the facts alleged, if it had been a passenger car, equipped with the same kind of platform. The details of the accident are fully set out in the complaint, and they clearly show that it did not result from the momentum or weight of the rear car or from the character of its load, or from the falling or jostling of some part of it. Nothing can be more certain from the averments than that it was the form, size, and exposed condition of the platform of the next car that caused the injury, and not the fact that the car was carrying baggage, or that it was constructed for the transportation of baggage. In fine, it appears from the complaint that the plaintiff was hurt, not because the train was made up in violation of the statute, but because a car with an open and exposed platform was attached to the rear end of the day coach.

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This overthrows the complaint by showing affirmatively that the negligence charged was not the proximate cause of the injuries sued for. *Enochs v. Pittsburgh, etc., R. R. Co.*, 145 Ind. 635, 44 N. E. 658; *Fairmount, etc., Ass'n v. Downey*, 146 Ind. 503, 45 N. E. 696; *City of Logansport v. Kihm*, 159 Ind. 68, 71, 64 N. E. 595; *Nickey v. Steuder*, 164 Ind. 189, 191, 73 N. E. 117.

The judgment is reversed, with instructions to sustain the demurrer to each paragraph of the complaint.

Judgment reversed.

SOUTHERN RY. CO. IN KENTUCKY v. MILLER.

(Court of Appeals of Kentucky, May 19, 1908.)

[110 S. W. Rep. 351.]

Carriers—Carriage of Passengers—Duty of Carrier—Carrying to Destination.*—A common carrier must use ordinary care to carry its passengers to their destination in a reasonable time, but is not responsible for delays caused by accidents that ordinary care may not guard against.

Same—Instructions—Damages.—Where plaintiff alleged that defendant railroad negligently failed to transport him to his destination in a reasonable time, that it failed to keep the caboose in which he was riding comfortably heated, and failed to put him down at the regular place for the landing of passengers, by reason of which plaintiff was made very uncomfortable, got his feet wet, and was sick a long time, the court should have instructed that if, as a proximate cause of the alleged negligence, plaintiff was made sick, the jury should find a fair compensation for the time lost and any physical or mental suffering endured and for any permanent reduction of his power to earn money, if such there was.

Same.—The court should also have instructed that plaintiff could not recover for any suffering or sickness which he might have prevented by ordinary care, or for anything which defendant by the exercise of ordinary care could not have reasonably guarded against; that if, when there was no negligence delaying the train, plaintiff voluntarily left it, before it arrived, and walked to the station, he

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see third foot-note appended to *Morgan v. Chesapeake & O. Ry. Co.* (Ky.), 28 R. R. R. 679, 51 Am. & Eng. R. Cas., N. S., 679; first foot-note appended to *St. Louis, etc., Ry. Co. v. Green* (Ark.), 27 R. R. R. 671, 50 Am. & Eng. R. Cas., N. S., 671; fifth foot-note appended to *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; last foot-note appended to *Valente v. Sierra Ry. Co.* (Cal.), 26 R. R. R. 676, 49 Am. & Eng. R. Cas., N. S., 676; *Magee v. New York, etc., R. Co.* (Mass.), 26 R. R. R. 221, 49 Am. & Eng. R. Cas., N. S., 221.

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could not recover for any sickness brought on him by the walk; and that if the delay in reaching the station was due to a wreck on the road, and could not have been avoided by ordinary care, and ordinary care was used to keep the caboose reasonably heated, they should find for defendant.

Same.—It is incumbent on a railroad to carry passengers to their destination, and it is immaterial who owns the track on which it runs its cars into the station.

Same.†—That a passenger was infirm or in a condition which aggravated injuries resulting from defendant railroad's negligent delay in transporting him, and from its failure to keep its cars in a reasonably comfortable condition, did not excuse defendant from liability.

Appeal from Circuit Court, Mercer County.

"To be officially reported."

Action by J. P. Miller against the Southern Railway Company in Kentucky. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

E. H. Gaither, Humphrey & Humphrey, Alex. P. Humphrey, and L. R. Yeaman, for appellant.

Robert Harding, E. V. Puryear, E. M. Hardin, and Green & Van Winkle, for appellee.

HOBSON, J. J. P. Miller is a merchant residing at Burgin in Mercer county, Ky. In March, 1907, he went to Louisville to buy goods, and after staying in Louisville several days took the evening train home. When he reached Harrodsburg, which is a few miles from Burgin, he changed cars; the regular train going on to Danville. At that point he took a freight train, which also carried passengers. The train was a little late and did not leave Harrodsburg until about 10:30 p. m. The ticket office was not open, and so he did not get a ticket. When he got upon the steps of the passenger coach, he saw that there was no light or fire in it, and so he went into the caboose, which was just behind it. He was the only passenger on the train. The conductor collected his fare, and, when they had gotten a few miles from Harrodsburg, the train stopped. This they did because there were some cars in front of them. Towards morning they moved on further, and at 7 o'clock, when they were in the yards at Burgin, but before the train had been pulled up to the platform, Miller got off and walked home. He testified that he was then seven-eighths of a mile from the station. The conductor testified they were about 200 yards from the station. He testified that during the night the caboose would get very hot, and then would cool off; that the wind blew in upon him from under the door, it being a cold night, and he was very uncomfortable; that he got his feet wet in walking

†See first foot-note appended to *Louisville & N. R. Co. v. Dougherty* (Ky.), 28 R. R. R. 178, 51 Am. & Eng. R. Cas., N. S., 178.

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home; that he went home and went to bed; and that at 10 o'clock he had a high fever and continued sick for a long time. He had had Bright's disease in the fall, but his physician testified that he was discharged as cured in February. He also testified that the Bright's disease came back upon him in his sickness, and that he was still suffering from it at the time of the trial. The defendant offered to show that the reason the train could not get to Burgin was that two flat cars loaded with long steel rails became uncoupled by one of the drawheads coming out, thus dumping the rails across the track and completely blocking traffic; that there was apparently no defect in these couplers or drawheads, and no amount of care could prevent the drawhead from pulling out; that by reason of the rails being upon the track there was a congestion of cars, so that the train could not get to Burgin sooner than it did; and that this was the sole cause of the delay. The defendant also showed that there was a good walk from where Miller got off the train to the station, and it did not appear that he at any time complained during the night about the caboose being uncomfortable. The court refused to allow the evidence offered by the defendant as to the cause of the delay, and at the conclusion of the evidence instructed the jury as follows: "You are instructed to return a verdict for the plaintiff for such a sum in damages as you believe from the evidence will be a fair compensation to him for any physical discomfort, trouble, or inconvenience caused him, if any, while in the defendant's caboose, by reason of the failure of the defendant to carry him within a reasonable time from its depot in Harrodsburg to its depot in Burgin; and if you believe from the evidence that the plaintiff was caused to be and did become sick or injured in his physical health because of the changing conditions of heat and cold prevailing in said caboose during the time he remained therein, or because of his having to walk from the place in the yards at Burgin, where the train stopped, to the depot, then you will find for the plaintiff such further sum as you will believe from the evidence will be a fair compensation to him for any physical and mental suffering caused him by such sickness and ill health, and for any permanent reduction of his power to earn money, if any, by said illness; your whole finding not to exceed the sum of \$5,000. No. 2. You can find for the plaintiff for no injuries sustained by him, if any, that are not proximate to the failure of the defendant to make the trip in the ordinary time with its caboose in ordinary comfortable condition and to deliver plaintiff at the accustomed place at Burgin where passengers alight from passenger trains." The jury found for the plaintiff and fixed the damages at \$4,000. The court entered judgment on the verdict, and the defendant appeals.

The court erred in excluding the evidence offered by the defendant to show the cause of the delay. A common carrier must

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use ordinary care to carry his passengers to their destination in a reasonable time, but is not responsible for delays which are caused by accidents that ordinary care may not guard against. If there was a wreck on the road not due to the defendant's negligence, and this prevented the train from running into Burgin, the defendant is not responsible for such delay as ensued which could not be avoided by ordinary care on its part. 6 Cys. 587; 5 Thompson on Negligence, § 6602-6; Hutchinson on Carriers, § 654. The instructions of the court do not properly present the law of the case. In lieu of instruction 1, the court will tell the jury that if the defendant negligently failed to transport plaintiff from Harrodsburg to Burgin in a reasonable time, or negligently failed to keep its caboose in a reasonably comfortable condition under the circumstances, or negligently failed to deliver plaintiff at the regular place for the landing of passengers at Burgin, and as the proximate result of these things, or any of them, the plaintiff suffered pain, or was made sick, they should find for him a fair compensation for the time lost, for any physical or mental suffering he endured, and for any permanent reduction of his power to earn money, if such there was. In lieu of the second instruction, the court will tell the jury that the plaintiff cannot recover for any suffering or sickness which he might have prevented by the exercise of ordinary care on his own part, or for anything which the carrier by the exercise of ordinary care could not reasonably have guarded against, and if, when there was no negligence delaying the train, the plaintiff voluntarily left the train and walked to Burgin station, the defendant is not responsible for any sickness brought upon him by the walk. By another instruction, the court will tell the jury that if the delay in reaching Burgin was due to a wreck on the road and could not have been avoided by ordinary care, and ordinary care was used to keep the caboose reasonably comfortable, they should find for the defendant.

It is not material who owned the track upon which the defendant ran its cars into Burgin station. It was incumbent upon the defendant to carry its passengers to Burgin, and no order given by the Cincinnati Railroad Company can excuse it from its obligation. But the facts may be shown, and if by reason of the wreck the train could not by ordinary care have been run into Burgin any sooner than it was, the defendant is not liable; and if, rather than wait for the train to get down to the station, the plaintiff walked to it, when there was no negligence on the part of the railroad company causing the delay, the defendant would not be responsible for any sickness brought upon him by reason of the walk. The fact that Miller was infirm or in a condition which aggravated the injury will not excuse the defendant from liability. The rule is thus stated in 3 Hutchinson on Carriers, § 1432: "If the passenger, at the time an injury is

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received through the negligence of the carrier, is suffering from some disease or illness which tends to aggravate the injury, the passenger's previous infirmity will not excuse the carrier from answering in damages to the full extent of the injury as affected by such infirmity; and the fact that the carrier was not informed of the passenger's condition will make no difference. Where a female passenger fell and was injured through the carrier's negligence while alighting from a passenger car, it was held that the fact that she wore an artificial limb which greatly aggravated the injury would not relieve the carrier from making full compensation for the real injury suffered. So where a female passenger who was pregnant was injured in a collision of cars, it was held that the carrier was liable for the injury, notwithstanding the fact that had she not been pregnant she would not have been injured." See, also, *L. & N. R. R. Co. v. Dougherty* (Ky.) 108 S. W. 336.

Judgment reversed, and cause remanded for a new trial.

TUCKER v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, June 5, 1908.)

[69 Atl. Rep. 850.]

Carriers—Injury to Passenger—Street Railroads—Negligence.*—

Plaintiff, a passenger on an electric car, was injured in a collision as the car was rounding a curve near the foot of an incline, because of excessive speed. The motorman approached the incline at proper speed, and when he saw that the air brake failed to check the car as it coasted down the incline he did everything in his power to stop it, but was unable to do so. It also appeared that when the motorman took charge of the car the machinery was in good order. Held, that the failure of the air brake to work, without premonition or warning, was the sole cause of the accident, and that defendant was not negligent.

Trial—Issues—Submission.—Where, in an action for injuries to a passenger by collision, there was evidence that the collision was caused solely by the failure of an air brake on the colliding car to work, and that plaintiff prior to the accident was a victim of hysteria, the court should have submitted to the jury at defendant's request the issues whether the motorman did everything he could do to check the speed of the car before reaching the curve at which the collision occurred, whether the difficulty in checking the speed of the car was caused by the failure of the air brake to work, and whether plaintiff had convulsions, fits, or spasms before the accident.

Same—Instructions—Requested Charge.—Where, in an action for in-

*See first foot-note appended to preceding cases.

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juries to a passenger, the evidence was conflicting as to the fracture of plaintiff's ribs, alleged to have been caused by the accident, and also with reference to plaintiff's being afflicted with hysteria prior to the accident, which might have been aggravated by her injury, a request that if plaintiff was subject to attacks of hysteria, evidenced by convulsions and other symptoms, before the accident, the jury could not find substantial damages for her, was erroneous, as ignoring the evidence as to the fracture of the ribs and the possible aggravation of plaintiff's prior infirmity, if any.

Same—Weight of Evidence.—The court is not required to give requested charges which comment on the weight of the evidence.

Same—Order of Proof.—The order of the introduction of evidence is within the discretion of the trial court.

Exceptions from Superior Court, Providence County.

Action by Emma A. Tucker against the Rhode Island Company. A verdict was rendered in favor of plaintiff for \$7,000, and, defendant's motion for a new trial being denied, it brings exceptions. Sustained, and cause remitted for a new trial.

On July 29, 1905, plaintiff, with her husband, boarded one of defendant's cars in Providence to go to her home in Warwick by way of Rocky Point. She occupied a seat near the middle of the car, with no one on the seat between her and the left side of the car. At or near the "chutes," within Rocky Point excursion grounds, there was a sharp reverse curve in the track, and approaching the curve was a steep decline in the roadbed. The car descended the decline at a speed of from 10 to 15 miles an hour, striking the curve, and tilted so that it collided with another car standing on an adjoining track. When the car struck the curve plaintiff was thrown against the guard rail, and when the collision occurred she was thrown to the floor between the seats. The motorman had shut off the power of the car on approaching the incline, and was allowing the car to coast in the ordinary manner, when, perceiving that the air brake did not check the car as usual, he made use of all the other appliances, including sand on the track, to partly check the speed, and succeeded in doing so to a very considerable extent. Plaintiff claimed to have been seriously injured, having two ribs broken and been rendered unconscious; but there was also evidence that for a number of years she had been a victim of hysteria.

Argued before DOUGLASS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

P. Henry Quinn, for plaintiff.

Henry W. Hayes and *Samuel W. K. Allen*, for defendant.

PER CURIAM. We do not find in the case any evidence of negligence on the part of the defendant. It does not appear that the

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grade was approached at an undue speed, and it is positively testified that after the air brake failed to check the car the motorman did everything in his power proper to stop it. It further appears that when the motorman took charge of the car the machinery was in good order. The accident seems to have been occasioned solely by the failure of the air brake to work, and the failure was without premonition or warning.

In the condition of the evidence when the case was closed, we think that certain of the issues tendered by the defendant ought to have been allowed and submitted to the decision of the jury. These are: "(1) Did the motorman do everything that he could do to check the speed of the car before reaching the curve at Rocky Point? (2) Was the difficulty in checking the speed of the car caused by the air brake not working well?" "(4) Did the plaintiff have convulsions, fits, or spasms before the alleged accident?" The third issue suggested was superfluous, as the same question is more specifically stated in the fourth.

The third request to charge was as follows: "If the jury find that the plaintiff was subject to attacks of hysteria, evidenced by convulsions and other symptoms, before the accident, they cannot find substantial damages for the plaintiff." This request ignores the evidence, which was conflicting, as to the fracture of the ribs alleged to have been caused by the accident, and also the reasonable contention that the disease, if existing before, might have been aggravated by the accident.

The other requests to charge, so far as they are not covered by the charge, are requests to the court to comment upon the weight of the evidence, which we have repeatedly held not to be compulsory upon the court.

The exceptions to the introduction of certain evidence are not tenable; for the evidence, so far as it went, was competent, although its probative force may have been small. The jury were entitled to decide upon its weight. Although this evidence would more properly have been reserved for the rebuttal, it was not objected to on that ground, and the order of introduction of evidence is in the discretion of the court.

The defendant's exception to the denial of the motion for a new trial on the ground that the verdict is against the evidence is sustained, and the cause is remitted to the superior court for a new trial.

WALL-HUSKE Co. v. SOUTHERN RY. Co.

(Supreme Court of North Carolina, April 22, 1908.)

[61 S. E. Rep. 277.]

Carriers—Transportation of Freight—Unreasonable Delay—Intrastate Commerce.*—The General Assembly has power to impose penalties for unreasonable delay in the transportation of intrastate freight.

Same—Statutes—Construction—Delay.—Under the express provisions of Revisal 1905, § 2632, imposing a penalty on carriers for delay in the transportation of freight, the carrier is absolutely entitled to two free days at the initial point of transportation, instead of one day, allowed by section 887, declaring that the time within which an act is to be done shall be computed by excluding the first day and including the last.

Same—"Intermediate Point."—Where freight less than a car load destined for a point on a branch line was loaded into a car intended to go through without breaking bulk, and the car at the junction was shifted from the carrier's main to its branch line, and transported to destination, the junction point was an "intermediate point" within Revisal 1905, § 2632, entitling a carrier to a delay of 48 hours at one intermediate point for every 100 miles of distance or fraction thereof without penalty for delay.

Same—Termination of Transportation.—Transportation of freight by a carrier was not terminated so as to relieve the carrier from liability for a penalty for delay prescribed by Revisal 1905, § 2632, on the train hauling the freight arriving within the yard limits of the point to which the freight was consigned, nor until the relation of carrier ended, and that of warehouseman began.

*For the authorities in this series on the subject of the validity of statutes prescribing penalties to compel common carriers to perform their duties to the public, etc., see foot-note appended to *Houston & T. C. R. Co. v. State* (Tex.), 28 R. R. R. 94, 54 Am. & Eng. R. Cas., N. S., 94; foot-note appended to *Tarr v. Oregon Short Line R. Co.* (Idaho), 28 R. R. R. 98, 51 Am. & Eng. R. Cas., N. S., 98; first foot-note appended to *Morris-Scarboro-Moffitt Co. v. Southern Express Co.* (N. Car.), 28 R. R. R. 122, 51 Am. & Eng. R. Cas., N. S., 122; foot-note appended to *Efland v. Southern Ry. Co.* (N. Car.), 27 R. R. R. 693, 50 Am. & Eng. R. Cas., N. S., 693; foot-note appended to *Toledo, etc., R. Co. v. Long* (Ind.), 27 R. R. R. 168, 50 Am. & Eng. R. Cas., N. S., 168; *Seaboard Air Line Ry. v. Seegers* (U. S.), 27 R. R. R. 147, 50 Am. & Eng. R. Cas., N. S., 147; *State v. St. Louis & S. F. R. Co.* (Ark.), 27 R. R. R. 110, 50 Am. & Eng. R. Cas., N. S., 110; *Cardwell v. North Carolina R. Co.* (N. Car.), 27 R. R. R. 89, 50 Am. & Eng. R. Cas., N. S., 89; foot-note appended to *Lawrence v. Rutland R. Co.* (Vt.), 27 R. R. R. 14, 50 Am. & Eng. R. Cas., N. S., 14; *Venning v. Atlantic Coast Line R. Co.* (S. Car.), 26 R. R. R. 666, 49 Am. & Eng. R. Cas., N. S., 666; *Hull v. Seaboard Air Line Ry.* (S. Car.), 26 R. R. R. 281, 49 Am. & Eng. R. Cas., N. S., 281.

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Same—Liability of Carrier—Termination.†—Where freight less than a car load was transported by a carrier, its liability as a warehouseman did not begin until it had unloaded the freight at its warehouse at destination, and notified the consignee that it was ready for delivery.

Same—Delay—Penalty—Intervening Sundays or Holidays.—Where freight, if transported without improper delay, should have been delivered on Friday, January 18th, and was not in fact delivered until Wednesday, the 23d, the carrier was not entitled to an allowance in the computation of penalties for delay imposed by Revisal 1905, § 2632, for the intervening Sunday, since, the default having begun on a week day, its duration was measured by the calendar not exceeding 30 days, irrespective of intervening Sundays or holidays.

Same—Running Time—Question for Jury.—In an action against a carrier to recover penalties for delay imposed by Revisal 1905, § 2632, the time required for the ordinary actual movement of a freight train for the distance over which the shipment in question passed held for the jury.

Same—Computation of Time.—Under the express provisions of Laws 1907, p. 669, c. 461, the time allowed for the transportation of freight by Revisal 1905, § 2632, namely, the actual running time for freight trains between the point of shipment and destination plus two days at the initial point and two days at each intermediate point, if any, must embrace within them the day of delivery if the goods were applied for, and for every day beyond that the carrier incurs the prescribed penalty.

Appeal from Superior Court, Forsyth County; Justice, Judge.

Action by the Wall-Huske Company against the Southern Railway Company. Judgment for plaintiff for less than the relief demanded, and both parties appeal. Reversed on both appeals.

L. M. Swink, for plaintiff.

Manley & Hendren, for defendant.

CLARK, C. J. It is well settled by this court that the General Assembly is entirely within its powers in imposing penalties for unreasonable delay in the transportation of intrastate freight. Connor, J., in *Stone v. Railroad*, 144 N. C. 223, 56 S. E. 933, says: "The validity of such legislation has been uniformly sustained in state and federal courts"—and quotes with approval from 9 Rose's Notes, 26, that the question is "too well settled to be longer the subject of controversy." The passage of the statute is a declaration of the lawmaking department that its enactment and the imposition of penalties upon common carriers is necessary to protect shippers and the great business interests of the state

†See second foot-note appended to *McGregor v. Oregon R. Co.* (Ore.), 28 R. R. R. 374, 51 Am. & Eng. R. Cas., N. S., 374.

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against unreasonable delay in transportation. The sole function of this department of the government is to ascertain and construe the true meaning and intent of the Legislature from the language used.

The plaintiff was consignee of a shipment, less than car load, from High Point, N. C., to Winston-Salem, N. C. The shipment was delivered to the railway company at High Point on January 14, 1907, arrived at the yards of defendant in Winston-Salem on January 19, 1907. It was unloaded at defendant's warehouse on January 22d, and notice of its arrival given to plaintiff on January 23d. The distance from High Point to Winston-Salem is admitted to be 44 miles. The railroad yards at Winston-Salem are about $2\frac{1}{2}$ miles in length, and have a track mileage of some 5 or 6 miles. No one seemed to know in what portion of the yards this shipment was placed upon its arrival, and it remained in the yards from January 19th to January 22d. The plaintiffs in the meantime repeatedly phoned and asked that they be notified of the arrival of this shipment. It was in evidence that two days, not more than three, was a reasonable time for transportation of freight from High Point to Winston-Salem, including stoppages. Upon the facts, his honor directed the jury to answer the issue \$12.50, holding that the penalty for delay in transportation ceased upon the arrival of the train carrying the shipment in the freight yard of its destination. The shipment was made in a car loaded to go through from High Point to Winston-Salem without breaking bulk. It moved via Greensboro, which is a general distributing point for the several roads of the defendant's system. At that point this car which came in from High Point on the defendant's main line was shifted and put into the local train on the line from Greensboro to Winston. The shipment was received at High Point on January 14th, and, after being carried 44 miles, the plaintiffs at Winston were notified of its arrival at that place on January 23d, and the goods were delivered to them on that day. The goods were thus in custody of the defendant 10 days, and were transported 44 miles—less than $4\frac{1}{2}$ miles per day.

Under the statute the defendant was entitled to two free days at the initial point, High Point, instead of one day allowed by general statute in computation of time. Revisal 1905, § 887; Davis v. Railroad, 145 N. C. —, 60 S. E. 722. Though the goods were not transferred by breaking bulk at Greensboro, which would have made it an "intermediate" point under Davis v. Railroad, 145 N. C. —, 60 S. E. 722, the car was taken out of the train on the main line, and shunted into the train on the local line. This we think equally makes Greensboro an "intermediate" point, entitling the defendant to the allowance of two free days. In addition, his honor should have told the jury to allow the ordinary average running time of freight trains for that

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distance Walker, J., Davis *v.* Railroad (at this term) *supra*. If this should be found to be one day, there would be an allowance of five days for the 44 miles. Chapter 461, p. 669, Laws 1907, prescribes that Revisal 1905, § 2632, "shall be construed to require the delivery at its destination within the time specified" (i. e., within the five days), which would have been on Friday, January 18th, and the plaintiffs are entitled to recover for five days' delay, beginning with Saturday, January 19th—i. e., one day—at \$12.50, and four days at \$2.50 each (Revisal 1905, § 2632), making \$22.50. The court erred in holding that, when the defendant got its train within the yard limits at Winston-Salem, the transportation ceased. The test, according to the ruling of this court in Alexander *v.* Railroad, 144 N. C. 93, 98, 56 S. E. 697, citing with approval and following the case of Hilliard *v.* Railroad Company, 51 N. C. 343, is when the railroad shifts its responsibility for carriage from that of common carrier to warehouseman. When it becomes a warehouseman and liable as a warehouseman, transportation ceases, and not before. It did not become liable as a warehouseman until it had unloaded its freight at its warehouse at Winston-Salem and the penalty accrued, under the facts of this case, ceased, when it had so transported the freight, and notified the consignee of such delivery which was on January 23d.

The defendant insists that the goods arrived in the yard 2:30 p. m. January 19th, Saturday and it could not deliver on Sunday, and that day should not be counted. It is true that, when freight in due time should arrive on Sunday, it cannot be delivered that day, even if it arrives, and such "last day being Sunday shall not be counted." Revisal 1905, § 887. But here: (1) If five days was the proper allowance, the goods should have arrived, and have been delivered on Friday, and the time of delay chargeable against the defendant began to be run and be counted with Saturday. (2) As a matter of fact, the goods did not arrive, were not placed in warehouse till January 22d (Tuesday), and they were not delivered till Wednesday 23d. The goods should have been delivered on Friday, 18th (if one day is found by jury to cover ordinary, actual running time). Every day's delay after Friday is time chargeable to defendant by the words of the statute, just as interest or any other computation of time, once begun to run, runs according to the calendar, without deduction of Sundays or holidays. The default having begun, the calendar, the course of the sun, measures its duration—not to exceed (by the terms of the statute) 30 days.

In the defendant's appeal there was error in the judge not leaving it to the jury to find the time of ordinary actual movement of a freight train for the 44 miles. Jenkins *v.* Railroad, 145 N. C. —, 59 S. E. 663. It is probably not more than one day, and the total time would, if so, be five days, but he also erred in the

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plaintiffs' appeal in counting arrival of goods as being the date of arrival in the yards, whereas the transportation was not terminated before the goods were taken out of car and placed in warehouse, and by terms of the statute (chapter 461, p. 669, Laws 1907), the time allowed for transportation—i. e., actual running time for freight trains between those two points—plus two days at initial point, plus two days at each "intermediate" point (if any), must embrace within them the day of delivery, if goods are applied for; and for every day beyond that the common carrier incurs the penalty prescribed by the statute.

In both appeals there is error.

SULLIVAN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 21, 1908.)

[84 N. E. Rep. 844.]

Witnesses—Cross-Examination—Purpose.—In an action for injuries to a passenger, the court did not err in allowing plaintiff to cross-examine defendant's conductor as to his understanding of the rules of the road, to show that the conductor's failure to make a report as required by the rules was because a truthful report would have shown his own misconduct, and that his testimony at the trial was not, therefore, entitled to credit.

Carriers—Injuries to Passengers—Right to Board Car.*—In the absence of an offer to accept plaintiff as a passenger after a car had started, the conductor was entitled to refuse to permit plaintiff to board the car, and after such refusal to use a reasonable degree of force to prevent plaintiff from boarding and entering the car, and for that purpose to lay hands on him and interfere with his person, using no more force than was necessary.

Same—Wanton Attack.*—A conductor, though entitled to use reasonable force to prevent a passenger from boarding a car after it had started, had no right to use excessive or unreasonable force, or to wantonly attack such intending passenger.

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

Action by John J. Sullivan against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant brings exceptions. Sustained.

Cookley, Cookley & Sherman and *Michal A. Sullivan*, for plaintiff.

Ralph A. Stewart and *Henry J. Hart*, for defendant.

*See last foot-note appended to *Morrill v. Minneapolis St. Ry. Co* (Minn.), 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629.

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SHELDON, J. 1. We cannot say that the court erred in allowing the plaintiff to cross-examine the defendant's conductor as to his understanding of the rules of the road. The plaintiff did not seek to prove what the rule of the road was, as in *Welch v. New York, New Haven & Hartford Railroad*, 176 Mass. 393, 57 N. E. 668, and *Stevens v. Boston Elevated Railway*, 184 Mass. 476, 69 N. E. 338. This was not, as in the cases just cited and in *Burns v. Worcester Consolidated Street Railway*, 193 Mass. 63, 78 N. E. 740, a case in which negligence might have been found from the violation of a rule. The plaintiff's object was to discredit the story of the conductor by showing that although he had not reported the occurrence in question, he yet understood that under the defendant's rules it was his duty to make such a report. That is, the plaintiff apparently desired to lay the foundation for an argument that the real reason for the conductor's failure to make a report was that the latter could not truthfully have done so without confessing his own misconduct, and so to contend that the conductor's story told at the trial ought not to be believed. For this purpose, it was not the rule itself, but the conductor's understanding of the rule, or rather, as the presiding justice correctly put it, his understanding of his duty under the rule, that was material. We find no error here.

2. But we are of the opinion that there was error in the ruling made that while the conductor was not bound to stop the car for the purpose of allowing the plaintiff to get upon it, and would have had the right to interfere with the person of the plaintiff to prevent his being injured, yet he had not the right to do so for the purpose of preventing the plaintiff from getting upon the car; that the conductor had no right to do this, had no right to interfere with the person of the plaintiff to loose the plaintiff's hold upon the car for the purpose of keeping him from getting on board. This ruling was given with reference to the contention of the defendant that the trouble with the plaintiff arose from his attempt to board the car while it was in motion, and the effort of the conductor to prevent him from doing so. It was distinctly and plainly stated to the jury, and the defendant by its exception invited the attention of the justice to the question.

In our opinion the jury should have been instructed as to this part of the case that if the car had started upon its return trip there was, while it was in motion, no offer to accept any one as a passenger, and the conductor had a right to refuse to accept any one who sought to board the car, and, after such refusal, to use a reasonable degree of force to prevent such a person from boarding and entering the car, and for that purpose to lay hands upon him and interfere with his person, using no more force than was reasonably necessary, though he would have no right to use any excessive or unreasonable force or to attack wantonly any such intending passenger. This is the necessary result of the doctrines

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laid down in *Webster v. Fitchburg Railroad*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521, and *Merrill v. Eastern Railroad*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705, and is the very point of the decision in *Hogner v. Boston Elevated Railway* (Suffolk, April 2, 1908) 84 N. E. 464. So in *Solomon v. Manhattan Railway*, 31 Hun (N. Y.) 5, 8. If the plaintiff persisted in his attempt to board the moving car, understanding that the conductor refused to receive him as a passenger, against the resistance of the conductor, he was a trespasser (*Massell v. Boston Elevated Railway*, 191 Mass. 491, 78 N. E. 108); and the conductor had the right to prevent him from carrying out his wrongful purpose by the use of such force as was reasonably necessary under the circumstances. If the car was not running for the transportation of passengers at all, but was merely being taken to the car barn to be put up for the night, the plaintiff's rights would be no greater than already has been stated. For any excessive force or for any wanton or reckless injury, there of course would be a liability. *McKeon v. New York, New Haven & Hartford Railroad*, 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437.

Exceptions sustained.

BRIGGS v. DURHAM TRACTION CO.

(Supreme Court of North Carolina, April 22, 1908.)

[61 S. E. Rep. 373.]

Carriers—Street Railroads—Collision of Cars—Negligence—Effect of Proof.*—While proof that a street car passenger was injured in a collision between two cars moving in opposite directions shows prima facie negligence, entitling the passenger to go to the jury in an action against the company for his injury, it does not create an irrebuttable presumption of negligence, such proof merely shifting the burden to

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see second foot-note appended to *Morgan v. Chesapeake & O. Ry. Co.* (Ky.), 28 R. R. R. 679, 51 Am. & Eng. R. Cas., N. S., 679; first foot-note appended to *Chaffee v. Consolidated Ry. Co.* (Mass.), 27 R. R. R. 706, 50 Am. & Eng. R. Cas., N. S., 706; second foot-note appended to *O'Gara v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 333, 50 Am. & Eng. R. Cas., N. S., 333; foot-note appended to *Cincinnati Traction Co. v. Holzenkamp* (Ohio), 25 R. R. R. 553, 48 Am. & Eng. R. Cas., N. S., 553; foot-note appended to *Pennsylvania R. Co. v. McCaffrey* (C. C. A.), 23 R. R. R. 23, 46 Am. & Eng. R. Cas., N. S., 23.

For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a passenger is injured, see last foot-note appended to *Pittsburg, etc., Ry. Co. v. Higgs* (Ind.), 24 R. R. R. 20, 47 Am. & Eng. R. Cas., N. S., 20, where all those preceding it are collected.

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defendant to prove that the collision resulted from an accident which reasonable prudence and foresight could not have prevented.

Same—Company's Duty.†—A street railway company must exercise a high degree of care, skill, and diligence in operating its cars, as far as is consistent with the practical operation of its business, but it is only liable for negligence, and is not an insurer of the safety of its passengers.

Same—Act of God.—A common carrier as well as an individual is excused from responsibility for injuries caused by an act of God.

Words and Phrases—"Act of God."‡—Any accident due directly and exclusively to a neutral cause without human intervention which, by no human foresight, pains, or care, reasonably to have been expected, could have been prevented, is an accident caused by an "act of God."

Carriers—Street Railways—Collision of Cars—Injury to Passenger—Negligence—Question for Jury.—In an action against a street railway company for injury to a passenger in a collision of cars, whether the company was negligent, held, under the evidence, a question for the jury.

Same—Duty to Maintain Headlights.—Electric railway cars should be provided with headlights.

Same—Negligence—Collision.—Where, if the conductor of a street car caused his car to leave a passing switch knowing that, under weather conditions, the steadiness of the current could not be relied on, in consequence of which the car was frequently unlighted, and if in the circumstances reasonable prudence and due care for the safety of his passengers required the car to remain at the switch, it was his duty to hold it there, and a failure to perform such duty amounted to actionable negligence if it caused a collision.

Appeal from Superior Court, Durham County; Webb, Judge.

Personal injury action by James Briggs against the Durham Traction Company. From a judgment for plaintiff, defendant appeals. New trial granted.

The court submitted these issues: (1) Was plaintiff injured by negligence of defendant as alleged in the complaint? Ans. Yes. (2) What damage, if any, has plaintiff sustained? Ans. \$500. From the judgment rendered, defendant appealed.

Manning & Foushee, for appellant.

Giles & Sykes, for appellee.

†See first foot-note appended to *Chaffee v. Consolidated Ry. Co.* (Mass.), 27 R. R. R. 706, 50 Am. & Eng. R. Cas., N. S., 706; first foot-note appended to *O'Gara v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 333, 50 Am. & Eng. R. Cas., N. S., 333.

‡For the authorities in this series bearing on the subject of the act of God as a defense in negligence cases, and using the term *eo nomine*, see last foot-note appended to *Alabama Great So. R. Co. v. Quarles & Couturie* (Ala.), 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69, where all those preceding it are collected; *Carpenter v. Baltimore & O. R. Co.* (Del. Sup'r Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679.

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BROWN, J. Plaintiff sues to recover damages for an injury alleged to have been sustained by him in a collision between two of defendant's electric cars on its track in Durham on December 19, 1906. Concerning the immediate cause of the collision and its effect upon him, the plaintiff testified: "After traveling about twenty minutes the car I was on collided with another car. The lights on the car were on when I got on, and then they went off. The car stopped, then presently the lights came on again, and this kept up until the time of the collision. There were no lights on the car at the time of the collision. Both of the cars were coming down hill, as near as I can remember. There were three, four, or five people on the car. When the collision occurred I was sitting on the right-hand side, and it flung me on the other side, and I fell and struck my back against the seat. I was thrown from the right-hand side to the left-hand side, across the aisle, and was struck about the middle of the back on the backbone. Did not see any lights on the other car." The defendant offered evidence tending to prove that the cause of the collision was the extinguishment of the lights; that all electric cars are lighted by electricity generated at the power house; that on this occasion its cars, wires, brakes, and line were in good condition, but that a heavy sleet falling on the wires kept the trolley pole from making connection with the overhead trolley wire, or, rather, that the electric current could not get from the wire to the trolley pole on account of the sleet. This caused the car to stop until the heat from the electric current could melt the sleet on the wire. When this was done the lights would come on the car, and the car would go forward until the sleet again stopped it. Consequently the progress of the car was slow, and the lights were first on and then off. There was a passing switch on Alston avenue. After waiting on the switch some 20 minutes, the car plaintiff was on went on towards East Durham to see what had become of the car from East Durham and assist it to get back to the car barn. The car from East Durham was in the same condition as the car bound for East Durham. The motorman was on the front platform looking for the other car and the conductor on each car was standing on the steps of the front platform looking around the vestibule to the front, watching for the other car. At the time of the collision, the east-bound car had stopped and the west-bound car was coming down a slight grade, without any current on, at the rate of four or five miles an hour. There was a slight jar.

The court charged the jury that if they should find from the evidence that at the time of the collision it was a dark night, and that the defendant had no lights on its cars, and further find that said collision occurred in the way and manner testified to by defendant's witnesses, then that the defendant was guilty of negligence, and that the jury should answer the first issue "Yes,"

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provided they should further find that such negligence was the proximate cause of the plaintiff's injury, if they should find by the greater weight of evidence that he was injured. To this charge the defendant excepted, as well as to the refusal of his honor to give the instructions tendered. We are of opinion that the exceptions are well taken.

While the proof that plaintiff was injured in a collision upon defendant's track between two of its cars moving in opposite directions makes out such a case of *prima facie* negligence as alone entitles the plaintiff to go to the jury, it does not create an irrebuttable presumption of negligence. It only shifted the burden of proof to defendant, requiring it to go forward with its proof and prove if it could that the collision was the result of an accident which reasonable prudence and foresight could not prevent. *Overcash v. Electric Co.*, 144 N. C. 573, 57 S. E. 377; *Winslow v. Hardwood Co.* (at this term) 60 S. E. 1130. The law exacts of a street railway company a high degree of care, skill, and diligence in operating its cars, as far as is consistent with the practical operation of its business, but it is only liable for negligence at last, and it is not an insurer of the safety of its passengers. "A carrier of passengers must exercise the care of a very cautious person surrounded by the same circumstances." *Nellis Street R. R. Acc. Law*, 123; *Bosqui v. Ry. Co.*, 131 Cal. 390, 63 Pac. 682. But a common carrier, as well as an individual is excused from responsibility for injuries which are caused by the act of God, which has been well defined by the learned counsel for defendants in their prayer for instruction to be "any accident due directly and exclusively to neutral cause without human intervention, which by human foresight, pains, or care, reasonably to have been expected, could have been prevented."

The charge of the learned judge practically cut the defendant off from going to the jury upon any feature of the case except the fact of injury, and the proximate cause. The latter is not in dispute. If the plaintiff was injured at all, it was in this admitted collision, and, as he is not charged with contributing to his injury, there can be no other cause for it. The circumstances under which the defendant's cars were running on this occasion, with the lights first on and then off, may or may not render it liable for negligence, according to the view the jury shall take, as to what was the duty of defendant's agents and conductors under such conditions. Under the evidence it was in this case essentially a question for the jury to determine. The learned annotator in a note to the case of *McGee v. Ry. Co.*, 26 L. R. A. 301, says: "It would seem to be a fair deduction from all the authorities that the question of running a street car of any kind in the dark without a headlight should be left to the decision of the jury." In that case it was held to be not negligence *per se* under any and all circumstances. We do not

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mean to intimate an opinion that electric cars should not be provided with headlights. On the contrary, we think they should. But whether it is negligence to run the car at all in the dark when the light is not burning must necessarily depend upon circumstances.

If the conductor of the car in which plaintiff was a passenger left the pass switch on Alston avenue with knowledge that, under weather conditions, the steadiness of his current could not be relied on, in consequence of which his car was frequently unlighted, and if the jury should find that under such existing conditions reasonable prudence and due care for the safety of his passengers required him to remain at the switch it was his duty to do so, and such omission of duty would constitute actionable negligence if it caused a collision.

New trial.

MULLINS v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi, June 8, 1908.)

[46 So. Rep. 529.]

Carriers—Ejection of Passengers—Grounds—Nonpayment of Fare.*

—A passenger boarded a train, intending not to pay the fare. When called on for a ticket he stated that he had no ticket or money. He was told that he would have to pay his fare or get off. The conductor stopped the train at a town and ejected him. There was no pretense of rudeness. When the train was nearly at a stop, a stranger offered to pay the fare, but the conductor refused to accept it. The passenger, after being ejected, stopped with a relative and suffered no trouble or inconvenience. Held, that he was not entitled to recover for his ejection from the train.

Same.*—On the refusal of payment of fare by a passenger, and on the stopping of the train to eject him on that ground, any contract, or any right to contract, for passage on such train, was forfeited.

Appeal from Circuit Court, Copiah County; R. L. Bullard, Judge.

Action by Dewitt Mullins, by next friend, against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*For the authorities in this series on the right to eject passengers on account of refusal or failure to pay fare, see first foot-note appended to Missouri, etc., Ry. Co. v. Smith (Ind. Terr. App.), 21 R. R. R. 688, 44 Am. & Eng. R. Cas., N. S., 688; Southern Ry. Co. v. Fleming (Ga.), 24 R. R. R. 600, 47 Am. & Eng. R. Cas., N. S., 600; Shelton v. Erie R. Co. (N. J.), 25 R. R. R. 70, 48 Am. & Eng. R. Cas., N. S., 70; Missouri, etc., Ry. Co. v. Smith (C. C. A.), 25 R. R. R. 50, 48 Am. & Eng. R. Cas., N. S., 50.

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W. R. Harper, for appellant.

Mayes & Longstreet, for appellee.

CALHOON, J. The appellant is a crippled boy, who got on the train with his suit case and no money to go from Brookhaven to his home at Hazelhurst, a few stations away. When called on for his fare he answered that he had no ticket nor money to pay his fare, and was told he would have to pay his fare or get off. Accordingly the conductor, with proper consideration for the boy, took him as far as the little town of Wesson, which town was not a stopping place for that train. The conductor and the boy went to the front door of the coach, and the flagman was there to assist him in getting off. There was no pretense of rudeness on the part of the railroad operatives. When the train was nearly at a stop a gentleman passenger, out of benevolence, offered to pay the fare of the boy to Hazelhurst, at which point he was destined to get off. The conductor told the gentleman that it was too late to pay after he had brought the train to a stop, and so he put the boy off.

At Wesson the boy stopped at the house of his uncle and had no trouble or inconvenience. In short, no damage whatever was shown. Wesson was within a few miles of his home, and there was a very short, and no doubt pleasant, delay in getting to his home. He had boarded the train with the design not to pay fare. The very great weight of authority is against recovery in such a case as this, and we think the conclusion of the court below was a wise one. If a different rule was established, the operation of railroad trains, so essential to the welfare and convenience of the people, could be made a mere plaything of recalcitrant or mischievous passengers. On the declension of payment of fare and the stopping of the train, any contract, or any right to a contract, for that passage, was forfeited.

This we regard as the true rule, and the case is affirmed.

HEINZE *v.* INTERURBAN RY. CO.

(Supreme Court of Iowa, July 9, 1908.)

[117 N. W. Rep. 385.]

Carriers — Carriage of Passengers — Setting Down Passengers.*—

Where an interurban railway conductor was advised by a passenger that he wished to alight, and saw the passenger moving toward the rear end of the car, and knew or should have known that the car had slackened its speed as if about to stop at the passenger's request, and the motorman had been given the usual signal to stop to discharge passengers, the conductor and motorman were bound to see that the passenger was not in the act of alighting before starting the car, which had not come to a full stop, with unusual force and violence.

Same—Contributory Negligence.†—An interurban railway passenger, who had signified his desire to alight, was not negligent as a matter of law in taking a position on the car step after the car had commenced to slow down.

Appeal from District Court, Polk County; William H. McHenry, Judge.

Suit to recover for personal injuries. There was a directed verdict for the defendant, and from a judgment thereon the plaintiff appeals. Reversed, and opinion (114 N. W. 534) withdrawn.

Hume & Hamilton, for appellant.

N. T. Guernsey and Parker, Hewitt & Wright, for appellee.

SHERWIN, J. The defendant operates a railroad from the corner of Sixth and Mulberry streets to and beyond East Sixteenth street in the city of Des Moines. Its cars do not stop at all street intersections; but there are stations several blocks apart at which it receives and discharges passengers who are either leaving the city or coming thereto. There was evidence in the record from which the jury would have been justified in finding the following facts: That the plaintiff had bought a ticket from the defendant entitling him to transportation from the starting point of defendant's line to East Sixteenth street, and that he entered one of the defendant's regular passenger cars at the former point; that when the car was within about a block of the plaintiff's destination he left his seat, handed his ticket to the

*For the authorities in this series on the question whether it is negligence to start a street car while a passenger is attempting to board car, find a seat, or alight, see foot-note appended to *Birmingham, etc., Co. v. Hawkins* (Ala.), 27 R. R. R. 689, 50 Am. & Eng. R. Cas. N. S., 689, where all those preceding it are collected.

†First foot-note appended to *Chicago Con. Traction Co. v. Schritter* (Ill.), 24 R. R. R. 442, 47 Am. & Eng. R. Cas., N. S., 442.

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conductor, and told him that he wanted to get off on Sixteenth street; that there was another passenger on the car for the same station, who had also notified the conductor of his destination; that about 50 feet before the car got to Sixteenth street the conductor gave the motorman the usual signal for stopping the car at Sixteenth street; and that the plaintiff heard the signal and understood what it meant. It was also shown that the other passenger, Mr. Swanders, had been in the vestibule of the car during its trip toward Sixteenth street; that as the car approached the street it slackened its speed; and that, when it started across Sixteenth street, he and the plaintiff stepped from the vestibule onto the car step, both of them taking hold of the railing provided for the purpose, and intending to alight when the car came to a full stop. The car was at that time moving slowly; but almost immediately after the plaintiff and Swanders had stepped down onto the step it gave a sudden and severe lurch, throwing both of them from the step to the street at a point between the middle and east side of the street. The car did not stop at the street.

We think the questions of the defendant's negligence and of the plaintiff's freedom from contributory negligence were for the jury, and that a verdict for the defendant was improperly directed. It is conceded that the appellant as a carrier of passengers was bound to exercise the utmost diligence and care consistent with its business to avoid injury to the plaintiff. The conductor was advised that the plaintiff wished to alight at Sixteenth street, and saw him moving toward the rear end of the car for that purpose. He also knew, or should have known, that the car slackened its speed as if about to stop at the request of the plaintiff when it reached Sixteenth street. The motorman knew that a stop was to be made at said street for the discharge of passengers, because he had been given the usual signal to make a stop there. The appellant's servants in charge of the car were fully advised, or in the exercise of that high degree of care which the law requires should have known, that the passengers desiring to alight would or might place themselves in a situation to do so with as little delay as possible, and they were bound not to subject the plaintiff to an unusual danger. Under such circumstances it is the rule that the operators of the car are bound to see that no passenger is in the act of alighting before starting the car with unusual force and violence, as was done in this case. *Root v. Des Moines City Ry. Co.*, 113 Iowa, 676, 83 N. W. 904; *Patterson v. Railway Co.*, 90 Iowa, 247, 57 N. W. 880; *Clark's Street Railway Accident Law* (2d Ed.) § 68; *Hutchinson on Carriers* (2d Ed.) § 615.

We do not think it can be said as a matter of law that the plaintiff was negligent because he took a position on the step of the car after it had commenced to slow up, as he supposed, for

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the Sixteenth street station. He had the right to assume that the car would stop there in accordance with his request and the direction of the conductor; and he also had the right to assume that in making the stop the car would be handled in the usual manner. *Root v. Railway Co., supra*; *Raben v. Railway Co.*, 74 Iowa, 733, 34 N. W. 621. The case should have been submitted to the jury. The judgment must therefore be reversed. Reversed.

YEVSACK v. LACKAWANNA & W. V. R. Co.

(Supreme Court of Pennsylvania, May 25, 1908.)

[70 Atl. Rep. 837.]

Carriers — Injury to Passengers — Contributory Negligence.*—Where a passenger alights from an electric car at a place where there are platforms along the tracks, and goes behind the car from which he alights, and is struck by a car on the next track, he cannot recover, where he did not look for it, and took the chance of crossing in front of it.

Same.*—That a passageway was provided by an electric car company from a platform on which passengers alighted to a platform on the other side of the tracks does not relieve the passenger, alighting from one car on the platform and passing behind such car over such passageway onto another platform, from the duty of looking for a car approaching on the other track, over which he knows cars constantly pass.

Appeal from Court of Common Pleas, Luzerne County.

Action by Michael Yevsack against the Lackawanna & Wyoming Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

John P. Lenahan and *Richard B. Sheridan*, for appellant.

John McGahren and *John A. Mangan*, for appellee.

FELL, J. The defendant operates a double-track electric railroad 18 miles in length between Wilkes-Barre and Scranton. Midvale, where the accident happened, is on the line of this road; but it is not a regular stopping place. Cars stop there

*See foot-notes appended to *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487; *Gregg v. Northern Pac. Ry. Co.* (Wash.), 28 R. R. R. 519, 51 Am. & Eng. R. Cas., N. S., 519; *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457.

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only on signal to take on or let off passengers. There is a platform on either side of the tracks, raised 3 or 4 inches above them. A plank walk, 12 feet wide and 23 feet long, level with the tracks, extends from one platform to the other. Between the tracks there is a fence about 4 feet high, which extends 130 feet in either direction from the walk. The town of Midvale is west of the tracks, and persons going from it to the east platform, or to it from this platform, are required to use the plank walk.

The plaintiff lived in Midvale, rode on the cars frequently, and was familiar with the situation. On a September evening, when it was dusk, he got off a north-bound car onto the east platform, and as the car moved from the station, he crossed the track behind it on the plank walk, and was struck by a south-bound car when stepping from the west track to the west platform. He testified that he looked north when on the east platform, again when on the east track, and again when between the rails of the west track; that the last time he looked he saw the car from which he had alighted 200 feet away, but saw no car approaching on the west track, although he could see up that track 250 feet. One of his witnesses, who was standing on the west platform waiting for a car, a place less favorable for observation because of a curve in the road, testified that he could see up the track 300 feet, and that he saw the car when it was that distance from the crossing; and another testified that the car that struck the plaintiff was 50 feet from the station when the car from which he had alighted had gone 30 feet from it.

It was the plaintiff's duty to look, after he had crossed the east track and passed the fence, before attempting to cross the west track. At this point he was within 7 feet of the west platform, and could see up the track 250 or 300 feet. The car was lighted, and there was nothing to prevent his seeing it, as his witness saw it. It could not first have come into view after he had looked. The testimony of the plaintiff's witnesses in relation to speed was that the car was running "pretty fast," "very fast," "as quick as she always goes into the station." These witnesses all agreed that the car was stopped within 150 feet of the crossing. In considering the plaintiff's testimony in the light most favorable to him, the conclusion is irresistible that he did not look, or that he saw the car and took the chance of crossing in front of it. The case is within the rule that a person who walks in front of a moving car, which he saw or could have seen by the exercise of the reasonable care which the law requires, will be conclusively presumed to have been negligent.

That the passageway over the tracks was provided by the defendant company for the use of persons going to or from the east platform was a fact to be considered in determining the plaintiff's negligence, but it did not relieve him from the exercise of reasonable care. It was not a place where passengers alighted,

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nor a way leading from the place where they alighted to the station to which they were going, which they might assume would be kept clear of trains and be safe at the time. It led from the platform on the east to the street, and, while its use was a convenience, and it may be a necessity, it was not a place where passengers stood in getting on or off cars. The care required in its use was not the ordinary care required of a passenger who must cross a track between his train and the station, but the greater care of a person at a crossing over which he knows trains constantly pass.

The judgment is reversed, and judgment is now entered for the defendant.

COOLIDGE v. LA CROSSE CITY RY. CO.

(Supreme Court of Wisconsin, Sept. 29, 1908.)

[117 N. W. Rep. 818.]

Carriers—Injury to Passenger—Negligent Operation of Car.—As plaintiff, a passenger on a trolley car, was descending the steps, the end of the trolley rope struck him in the eye, destroying its sight. The conductor had released the rope, and swung it around in front of the steps, intending to catch it with his other hand. Held, that such facts warranted findings that the conductor's act was negligence for which defendant was responsible, that it was the proximate cause of the injury, and that a person of ordinary care ought to have foreseen that some injury would be likely to result from such act when persons were leaving the car.

Appeal from Circuit Court, La Crosse County; J. J. Fruit, Judge.

Action by Robert Coolidge against the La Crosse City Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This action is brought to recover damages for the loss of an eye, alleged to have been caused by the actionable negligence of defendant, which operates a street railway in the city of La Crosse. The plaintiff was a passenger on one of defendant's cars, and desired to leave the same at the end of its journey. While plaintiff was on the rear platform, and about to descend from the car, he was struck in the eye by the end of the trolley rope, and it is claimed that the blow thus received resulted in the loss of his right eye. It appeared that the car in question was of the ordinary kind, with a vestibule platform at each end. On arriving at the end of its route, the direction of the car was reversed by releasing the trolley from the wire and swinging it around, and

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bringing it in contact with the wire above the other end of the car. This was done by means of a rope, one end of which was fastened to the trolley pole. There was a loop bound with wire on the other end which passed through the window in the center of the vestibule, and hung on a hook on the inside. In swinging the trolley it appeared that the defendant's employees sometimes disengaged the rope from the hook and dropped it through the vestibule window, so that they were obliged to leave the car in order to get hold of it to swing the pole. It also appeared that conductors were in the habit of catching the rope some distance from the loop, extending one hand through the window of the vestibule, swinging the rope around the side of the vestibule, and catching it with the disengaged hand. It seems to be conceded that the distance that the rope would have to pass was so great that the conductor could not reach through the center vestibule window and pass the rope around so as to catch the other end without swinging or throwing it. At the time in question, the conductor attempted to pass the looped end of the trolley pole rope through the window in the center of the vestibule around to the side entrance by swinging or throwing the rope with one hand, and catching the looped end with the other. As plaintiff was on the platform of the vestibule, and about to descend from the car, the looped end of the rope, thrown by the conductor, struck him in the eye. The eye became swollen and inflamed, and plaintiff has lost the use of the same. About two years prior to this time plaintiff lost his other eye through an accident, and he is now totally blind.

The jury found: (1) That the defendant was guilty of negligence which caused the injury to and loss of the sight of the plaintiff's right eye. (2) That the injury to the plaintiff was the natural and probable consequence of defendant's negligence. (3) That, in the light of attending circumstances, a person of ordinary care ought to have foreseen that some injury would be likely to result from such negligence. (4) That the injury to the plaintiff was not the result of an accident without negligence of either party. (5) That the plaintiff was entitled to recover damages to the amount of \$10,000. Judgment was rendered on this verdict for the plaintiff. From such judgment, defendant brings this appeal.

Woodward & Lees, for appellant.

Higbee & Higbee, for respondent.

BARNES, J. (after stating the facts as above). Defendant assigns as error: (1) Failure of the court to direct a verdict in its favor. (2, 3, 4) Refusal to charge the answers to the first, second, and third questions in the special verdict from "Yes" to "No." (5) Refusal to enter judgment for defendant on the verdict as so amended. Substantially the same reasons are urged

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in support of defendant's motion for a directed verdict as are urged for modifying the special verdict so as to entitle the defendant to judgment thereon. The defendant's contentions are: (1) The trolley rope was not handled in a negligent manner. (2) The injury was not the natural and probable consequence of the act. (3) A person exercising ordinary care ought not to have foreseen that some injury would be likely to result from defendant's alleged negligent act, considered in the light of attending circumstances.

The jury found all these disputed questions of fact in favor of the plaintiff, and we think it was fairly within its province, on the evidence before it, so to do. The rope in question was about one-quarter of an inch in diameter, or perhaps more. There was a loop on the end of it fastened by wire. To "swing," "pass," or "toss" this rope (using the words of the conductor in describing what he did) in such a manner that the looped end of it was liable to come in contact with passengers' eyes as they were leaving cars seems to us to clearly warrant the jury in finding that there was a negligent handling of the rope, notwithstanding any practice or custom that was in vogue. If the employees of the defendant chose to take this method, instead of the safe one of dropping the rope out of the vestibule window, and then walking around the end of the car and securing it, it should not have been practiced while passengers were alighting from cars. It is true that the blow, if such it might be called, was not attended with any great degree of violence. It is none the less true that the eye is an extremely sensitive organ, and that a comparatively slight blow upon the eyeball may produce serious consequences, and it would be rather hard to escape the conclusion that the swinging of the rope in such a manner that the looped end of it might well come in contact with the eyes of passengers was a negligent act on the part of the conductor.

So, too, we think it was for the jury to say upon the testimony offered whether or not the injury was the natural and probable consequence of the defendant's negligence. The evidence is ample to warrant the conclusion of the jury. The same may be said of the finding of the jury, to the effect that, in the light of attending circumstances, a person of ordinary care should have foreseen that some injury would be likely to result from defendant's negligent act. The case before us is very similar to that of *McQuade v. The Golden Rule* (Minn.) 117 N. W. 484, in which a judgment for the plaintiff was sustained. There is no error in the record.

Judgment affirmed.

ST. LOUIS & S. F. R. CO. *v.* ROANE.

(Supreme Court of Mississippi, June 15, 1908.)

[46 So. Rep. 711.]

Carriers—Carriage of Passengers—Ejection—Actions—Right to Recovery.*—Plaintiff's intestate and his brother, who were in the last stages of consumption, were going home, and, there being a yellow fever epidemic in several states, it was necessary to have health certificates to travel, which the boys had, and they secured a ticket from defendant railroad by way of H.; arrangements having been made with the health officers of that place to permit them to disembark. When they boarded defendant's train, their tickets and health certificates were shown to the conductor; but shortly after they left the station a quarantine officer of H. ordered them to get off the train, and it was stopped, and they were assisted to get off. The conductor was present when they were ordered off by the health officer, and did not protest, and they were both too weak from disease to protest and were afforded no opportunity to explain, and, after being ejected, went home by another route; one of them dying 3 days later. Defendant claimed that the quarantine officer acted under an ordinance of the city, and the conductor did not know that the boys had a permit to get off at H. Held, that under their contract of passage the boys were entitled to protection by the company, and the conductor should not have allowed them to be put off the train, and plaintiff was entitled to compensatory damages for the ejection of decedent.

Same—Exemplary Damages.†—Two boys, who were in the last stages of consumption, secured a ticket from defendant and had a health certificate, which was necessary to travel because of a yellow fever epidemic, and arrangements had been made with the city officials of H. for them to disembark there; but a quarantine officer of H. boarded the train before they reached that place and ordered them to get off, and the conductor, who was present, did not know that they had a permit to get off at H., and did not protest, and the boys were so weak by disease that they could not, and were thereby delayed 36 hours, and one of them died 3 days later. Held, that exemplary damages could not be recovered for their ejection, but only actual damages for the violation of their contract of transportation.

Same—Excessive Damages.—Where a boy, who was in the last

*For the authorities in this series on the liability of a carrier of passengers on account of the enforcement of quarantine regulations, see foot-note appended to *Baldwin v. Seaboard A. L. Ry. Co.* (Ga.), 27 R. R. R. 97, 50 Am. & Eng. R. Cas., N. S., 97.

†For the authorities in this series on the question whether exemplary or punitive damages may be recovered against the carrier for the ejection of a passenger, see second foot-note appended to *Birmingham, etc., Co. v. Lee* (Ala.), 28 R. R. R. 618, 51 Am. & Eng. R. Cas., N. S., 618.

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stages of consumption, secured a ticket from defendant railroad and had a health certificate, which was rendered necessary by a yellow fever epidemic, and arrangements had been made with city officials for him to disembark at H., but a quarantine officer of H. compelled him to get off the train before reaching that place, and the conductor, not knowing he had a permit to get off at H., did not protest, and the boy was unable, on account of weakness from sickness, to explain, and was detained for 36 hours after his ejection and compelled to go home by another route, and died 3 days thereafter, a verdict for \$7,500 was clearly excessive, and will be reduced to \$2,500.

Appeal from Circuit Court, Marshall County; J. B. Boothe, Judge.

Action by W. A. Roane, administrator of Archibald C. Roane, deceased, against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed, on condition that a part thereof be remitted; otherwise, reversed and remanded.

The facts are in substance as follows: Archibald C. Roane, age 18, and his brother Ralph Roane, age 22, were returning from the West, where they had been in search of health; both being then in the last stages of consumption. At the time at which this action arose there was a yellow fever epidemic in certain parts of Mississippi and Louisiana, and in order to travel in most of the Southern states it was necessary to have health certificates. Both boys had health certificates, showing that they had not been in infected territory, and were admitted upon said certificates into the city of Memphis, Tenn. There they purchased through tickets from Memphis to Oxford, Miss., by way of Holly Springs, Miss., where it was necessary to change cars. Arrangements had been made with the city authorities and health officer of Holly Springs for the boys to disembark at that place and change cars for Oxford, where arrangements had also been made for them to disembark. The ticket agent at Memphis examined their health certificates and sold them through tickets to Oxford. They boarded the train of the appellant railroad company at Memphis, but before they had proceeded more than a mile from the station they were approached by a man who claimed to be a quarantine officer of the city of Holly Springs and told to get off the train. The train stopped, and they were assisted off, and boarded an electric car, and went back into Memphis, where they found an uncle, who got them quarters in a hotel. After waiting in Memphis about 36 hours, they went by another route to Grenada, Miss., and thence to Oxford. Archibald Roane died 2 or 3 days after arriving at Oxford, and his brother lived a month or so. Ralph Roane testified, before he died, that, when he and his brother boarded the train, their tickets and health certificates

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were exhibited to the conductor and other officers of the train and that they were allowed to get aboard; that the conductor was present at the time they were put off the train by the quarantine officer; that no explanation was made to them, nor were they given an opportunity to make any explanation themselves; that they were both too weak and exhausted to protest, so weak, in fact, that they could hardly speak and make themselves understood; that when they were told to get off and "take another car" they did not realize what was meant until, after getting off of the train, they saw the electric car on the track and realized that they had been ejected from appellant's train; that they were so weak and exhausted as to be almost helpless, and witness was afraid he would not get his brother Archibald home before he died; and that they were both greatly frightened, and suffered great physical and mental anguish. The defendant contends that the quarantine officer of the city of Holly Springs was acting under an ordinance of that city forbidding persons getting off of trains at that place without health certificates from the health authorities of Holly Springs, and that the conductor of the railroad company had no knowledge of the fact that arrangements had been made for these young men to get off at Holly Springs, and that the railroad company was, therefore, not liable.

J. W. Buchanan and *W. F. Evans*, for appellant.

C. L. Sivley and *James Stone*, for appellee.

MAYES, J. Under the facts disclosed by the record, the railroad company is liable for compensatory damage only. There is nothing in this record which would warrant the imposition of punitive damages. There was no conduct of any of the officers or employees which evinced any wantonness or willful disregard of the rights of the deceased, nor was there any bad faith on the part of the company, but a breach of contract pure and simple. The suit was for \$15,000, and the jury awarded \$7,500. It is shown that Archie Roane was detained about 36 hours. In no view of this case can the judgment be sustained for the amount awarded. Archie Roane was in such physical condition as entitled him to the greatest care and consideration on the part of the company, when it suffered him to be wrongfully put off the train. Under his contract of passage, the law gave him the right to their full protection, and the company should not have allowed him to be put off the train; but, under the facts, compensation is the measure of the recoverable amount. Such being in law the measure of his recovery, the awarding of \$7,500 by the jury is grossly excessive. It would be a species of grossest injustice to the railroad to allow this judgment to stand for this amount. Under the facts shown by this record, had the party suffering the damage complained of been in good health and full vigor, we would reduce the judgment to nominal damage; but in

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view of the enfeebled condition of the deceased, then being in the last stages of consumption, easily exhausted, and almost too weak to stand, not being able because of this condition to speak above a whisper, we feel bound to take into consideration these facts in measuring the liability of the company for their breach of duty towards this passenger. It is our opinion that no judgment should be allowed to stand for more than \$2,500, and we fix this as the amount of recovery. If the judgment shall be remitted here to this amount, the case is affirmed; if this shall not be done, it is reversed and remanded; but in any event the cost of this appeal must be taxed against the appellee.

REYNOLDS & CRAFT v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Sept. 30, 1908.)

[62 S. E. Rep. 445.]

Carriers—Connecting Carriers—Liability.*—At common law a connecting carrier is not bound by the contract as to freight rates fixed by the initial carrier, issuing a through bill of lading, unless the initial carrier acted with authority as agent for the connecting carrier; and where the initial carrier without authority agrees to transport goods for less than the regular rates of the connecting carrier the latter may collect the usual rates, and the shipper must look to the initial carrier for damages for breach of contract.

Same—Excessive Freight Charges—Recovery by Shipper.—A connecting carrier, who is a party to a contract of through shipment, made by the initial carrier having authority to make such contract, is bound to pay back to the shipper any excess of freight charges received.

Same.—Under 24 St. at Large, p. 1, making each carrier the agent of its connecting carrier, and providing that a through contract of shipment shall be the contract of each carrier, etc., a connecting carrier, acting on a through bill of lading issued by the initial carrier for an intrastate shipment, is a party to the contract, and is liable to the shipper for exacting excessive freight charges.

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by Reynolds & Craft against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

*See note, 22 R. R. R. 260, 45 Am. & Eng. R. Cas., N. S., 260; last foot-note appended to Chesapeake & O. Ry. Co. v. Stock & Sons (Va.), 22 R. R. R. 31, 45 Am. & Eng. R. Cas., N. S., 31; note, 28 R. R. R. 438, 51 Am. & Eng. R. Cas., N. S., 438.

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WOODS, J. In July, 1905, the Southern Railway Company received at Ft. Mill, S. C., a car load of machinery to be transported and delivered to the plaintiffs at Swansea, S. C. The bill of lading stated the weight at 41,700 pounds, and the freight rate at 28.4 cents per 100 pounds. As the Southern Railway does not reach Swansea, which is a station on the Seaboard Railway, the machinery was received from the Southern Railway at Columbia, and carried by the Seaboard to Swansea. The real weight of the machinery was 14,700 pounds, instead of 41,700, as stated in the bill of lading; but the Southern Railway Company had contracted with the plaintiffs that it should be charged for as 20,000 pounds, in order that plaintiffs might receive the benefit of the car load rate of 28.4 cents per 100 pounds. The defendant, the terminal carrier, refused to deliver the machinery, except upon payment of \$118, the freight on 41,700 pounds at the rate stated in the bill of lading. The plaintiffs under protest paid the charge exacted, and brought this action in a magistrate's court to recover from the Seaboard Railway Company the excess freight charge of \$61.62, the difference between the freight on 20,000 and 41,700 pounds at the agreed rate. As the facts appear in the record, there is no doubt of the plaintiffs' right to recover the excess charge. The only question is whether the plaintiffs must look to the Southern Railway Company, and not to the Seaboard Railway Company. The judgment of the magistrate in favor of the plaintiffs against the Seaboard Railway Company was affirmed by the circuit court.

Under the common-law rule, as settled by the adjudications in this country, a connecting carrier is not bound to comply with the contract as to freight rates fixed by the carrier issuing a through bill of lading, and is not responsible to the shipper for mistakes made in the bill of lading, unless the contracting carrier, in issuing the bill of lading, acted, not only for itself, but as agent for the connecting carrier under authority express or implied. If by the bill of lading the initial carrier, without authority from the connecting carrier, agrees to transport goods for less than the regular rates of the connecting carrier, such connecting carrier may nevertheless collect its usual rates, and the shipper must look to the carrier with whom he contracted for damages for breach of its contract. The principle stated is recognized and applied in *Lewis v. Atlanta & C. A. L. R. R. Co.*, 25 S. C. 249, and also in the following cases in other states: *Detroit, etc., R. R. Co. v. McKenzie*, 43 Mich. 609, 5 N. W. 1031; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56; *Mount P. Mfg. Co. v. Cape Fear & Y. V. R. Co.*, 106 N. C. 207, 10 S. E. 1046; *Goodin v. So. Ry. Co.*, 125 Ga. 630, 54 S. E. 720, 6 L. R. A. (N. S.) 1054; *Crossan v. N. Y., etc., R. Co.*, 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

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So, also, it would seem on the same principle, if the shipper makes a contract with the initial carrier, evidenced by a bill of lading which calls for an overcharge of freight to be paid before delivery of the goods, the terminal carrier, receiving the goods to be delivered on payment of the charges set down in the bill of lading, cannot be held responsible by the consignee for the mistake made by him or the shipper and the contracting carrier in their agreement, and be held liable to refund the overcharge, unless the initial carrier contracted as agent of the terminal carrier. If the terminal carrier was a party to the contract of shipment, then, of course, it is as much bound to pay back any excess of freight charges received by it through mistake, whether its own or that of the initial carrier, as would be the initial carrier.

It is not necessary to decide whether there was any evidence tending to show that the Southern Railway Company had authority to make the defendant Seaboard Railway Company a party to the contract, and undertook to do so. This was an intrastate shipment, and the statute of the state fixes the relation of the two carriers. Section 1 of the act of 1903 (24 St. at Large, p. 1) provides: "That all common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in, or acted upon by such carriers, shall in this state, with respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of the state, any through bill of lading, way bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them."

This statute has been held constitutional as to shipments entirely within the state. *Venning v. A. C. R. R. Co.*, 78 S. C. 42, 58 S. E. 983, 12 L. R. A. (N. S.) 1217. Under the statute, when the Seaboard Railway Company recognized, acquiesced in, and acted upon the through bill of lading, it became a party to

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the contract of shipment, and was as much bound not to exact the excess charges due to a clerical mistake as was the Southern Railway Company in whose name the contract was made. The Seaboard Air Line Railway Company having exacted freight charges for 41,700, when there was in fact, according to the weighing of its own agent, only 14,700, which it had contracted to deliver as a car load of 20,000 at 28.4 cents per 100 pounds, it is liable to the plaintiffs for the excess due to the clerical error. The judgment of the circuit court is affirmed.

LOUISVILLE & N. R. Co. v. SCALF.

(Court of Appeals of Kentucky, June 9, 1908.)

[110 S. W. Rep. 862.]

Carriers—Carriage of Passengers—Actions—Evidence—Admissibility.—In an action against a carrier, in that a passenger coach was not properly heated or lighted or furnished with sufficient drinking water, and that the coach was permitted to become in a dirty condition, resulting in physical and mental suffering by a passenger and his taking cold, evidence of complaints as to the condition of the car made by the passengers to each other, but not to the carrier's employees, was incompetent.

Same—Contributory Negligence.—One who had not enlisted in the State Guards, but who accompanied them on a railroad trip simply at the captain's request to fill out the quota of the company, and who could, without subjecting himself to any military discipline, have left the passenger coach occupied by the company after discovering that it was dirty or gave out offensive odors, or was not sufficiently heated, and taken passage in another coach free from such conditions and did not do so, cannot recover because of such conditions.

Same—Proximate Cause.—Where it is impossible to determine whether the cold contracted by a passenger resulted from the insufficient heating of the car or from the fact that after arrival at his destination he marched with a militia company and stood around for several hours in the cold without an overcoat, the carrier is not liable.

Appeal from Circuit Court, Knox County.

Action by Lee Scalf against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Jas. D. Black and *Benjamin D. Warfield*, for appellant.

John H. Wilson and *B. B. Golden*, for appellee.

CLAY, C. Appellee, Lee Scalf, went with the Barbourville

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State Guards to the inauguration of Governor Beckham in December, 1900. Complaining that the coach in which he went to and returned from Frankfort was not properly heated or lighted, and was not furnished with sufficient water for drinking purposes, that the stoves and lamps smoked, and that the car was permitted to become in a noisome and filthy condition, and that by reason thereof, he experienced great physical and mental suffering and caught severe cold, he instituted this action for damages against the appellant, Louisville & Nashville Railroad Company. He recovered a verdict for \$500, and the railroad company appeals.

It appears from the record that appellee never enlisted in the State Guards by taking the obligation required by law. The captain of the company simply requested him to accompany the guards for the purpose of filling out the quota of the company. He thereupon volunteered, and did go with the company. According to appellee's contention, the bad conditions prevailing in the car were due to the negligence of the employees of the appellant company, while the latter insists that those conditions were due entirely to the acts of appellee and his companions in raising the windows of the car, in attempting to put coal in the fires, in punching the fires with their bayonets, and in scattering lunches over and vomiting on the floor of the car. Appellant asks a reversal on the ground of the admission of incompetent testimony, and also because of error in refusing and giving instructions.

It appears that the trial court permitted several witnesses to testify to the fact that the members of the guard complained of the cold and the other conditions of the car, and expressed these complaints to each other. As these complaints were not made to the employees of the railroad, they were manifestly incompetent, and all such evidence should have been excluded by the court.

Appellant asked the following instruction: "If you shall believe from the evidence that the plaintiff, Lee Scalf, was not a member of the military company on the trip to, or return from, Frankfort on the occasion mentioned in the evidence, but that he voluntarily undertook to and did make said trips, and that he could without subjecting himself to any military discipline or penalty have left the coach which was occupied by said company on said trip after discovering that said coach was dirty or filthy, or gave out offensive odors, or was insufficiently heated, or the lamps gave insufficient light, or emitted foul or offensive odors, or the stoves in said coach gave out smoke, to the discomfort of plaintiff, if any such conditions existed, and could have taken passage on said trips in another coach free from such conditions and failed to do so, you should find for the defendant." We think the court erred in failing to give this, or a similar instruction. Indeed, as there was no proof that appellee was a member of the military company, he could have left the car without subjecting

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himself to any military discipline or penalty. The statutes do not provide a punishment, except for enlisted men. No power is given to discipline those who go as mere volunteers and who have not enlisted in the service by taking the obligation required by law. Upon the next trial, the court should give the following instruction: "The court instructs you that the plaintiff, Lee Scalf, was not a member of the military company on the trip to and from Frankfort on the occasion mentioned in the evidence, and that he could, without subjecting himself to any military discipline or penalty, have left the coach which was occupied by him on said trips. And if you believe from the evidence that said coach was dirty or filthy, or gave out offensive odors, or was not sufficiently heated, or the lamps gave insufficient light or emitted foul and offensive odors, or that the stoves in said coaches gave out smoke, to the discomfort of the plaintiff, if any such conditions existed, and that the plaintiff on said trip could have taken passage in another coach free from such conditions, and failed to do so, you should find for the defendant." Appellee complains of the fact that he contracted a severe cold by reason of the cars being insufficiently heated. It appears, however, that after his arrival in Frankfort he marched and stood around for several hours in the cold without any overcoat on. It was therefore impossible to tell whether the cold he contracted resulted from the insufficient heat of the car or from the exposure to the severe weather then prevailing at Frankfort. Upon the next trial, unless there be some evidence that the cold complained of was the proximate result of the condition of the car, all evidence of the cold should be excluded, and the court should omit from its instructions the right to recover on that ground. *Louisville & Nashville Railroad Co. v. Wathen*, 49 S. W. 185, 22 Ky. Law Rep. 82; *Groves v. Louisville & Nashville Railroad Co.*, 96 S. W. 439, 29 Ky. Law Rep. 725, 97 S. W. 340, 1291; *Louisville Gas Co. v. Kaufman, Straus & Co., etc.*, 105 Ky. 131, 48 S. W. 434.

For the reasons given, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

JOHNSON *v.* MICHIGAN UNITED RYS. CO.

(Supreme Court of Michigan, May 26, 1908.)

[116 N. W. Rep. 529.]

Carriers—Passengers—Tickets—Acceptance by Conductor.*—A carrier is not estopped to deny a passenger's right of transportation contrary to the terms of his contract by reason of acts of its conductor in previously accepting such contract.

Same—Actions—Evidence—Assumption of Contract of Other Company.—In an action against a carrier for breach of a contract contained in a mileage book issued by another company, held, that the evidence tended to show an assumption of the contract by defendant and a recognition of its liability thereunder.

Same—Admissibility of Evidence.—In an action against a carrier for breach of a contract contained in a mileage book issued by another company, evidence that defendant's conductor had accepted such mileage book for several months was admissible as tending to show that defendant had assumed the contract.

Error to Circuit Court, Calhoun County; Walter H. North. Judge.

Action by Henry F. Johnson against the Michigan United Railways Company. From a judgment for plaintiff, defendant brings error. Affirmed.

The defendant owns and operates an electric interurban railroad between the cities of Battle Creek and Kalamazoo, with intermediate stations. Plaintiff, on October 20, 1906, presented himself as a passenger on a car upon said road at a usual station in Battle Creek, asking for transportation to a place called the "Guide Board," a distance of 6.94 miles. He presented to the conductor a mileage book reading as follows: "Jackson & Battle Creek Traction Company. Mileage Book. 400 miles. No. 2,265. Issued to H. F. Johnson, Augusta, Battle Creek. Good only when officially stamped and presented with coupons (mileage strip) attached, subject to the conditions named hereon. Void for passage after date canceled in margin. F. L. Potter, Treasurer. Read all the conditions and notices hereon. No. 2,265." Each coupon represented a mile. The ticket was issued subject to several provisions, the only one of which material here to note is that: "Detachments will be made by the conductor to cover actual mileage traveled on his train." The conductor proposed to

*For the authorities in this series on the subject of the authority of the carrier's employees to waive the conditions of contracts for the transportation of passengers, see foot-note appended to *Illinois Cent. R. Co. v. Jennings* (Ill.), 27 R. R. R. 91, 50 Am. & Eng. R. Cas., N. S., 91.

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detach eight coupons, being transportation for eight miles. The plaintiff insisted that he take but seven. Plaintiff's testimony upon this point is as follows: "The conductor came around for his fare, and as he came to me I handed up this book, and says: 'Guide Board, seven miles.' I mentioned seven miles for the reason that some conductors have taken eight from the book. He says: 'Eight miles.' 'No,' I says, 'seven.' 'Well,' he says, 'I take eight from these books. I take eight or nothing.' 'Well,' I says, 'you cannot take eight from that book.' He says, 'I shall,' and pulled out his slip, and I reached up and took hold of the book and says: 'Hold on! Don't take eight miles. It is only seven miles to the Guide Board.'" The conductor then demanded that he pay his fare unless he would consent to detaching eight coupons. Plaintiff refused to pay, and the conductor ejected him from the car. He then brought this action to recover damages, claiming that his ejectment was unlawful. His declaration alleged that he owned a mileage book "issued by, used by, and recognized by defendant as good for the payment of passenger fares upon and over said so-called Electric Interurban Line." He was allowed to amend his declaration by alleging that the mileage book was "issued by and sold by the Michigan Traction Company at its office in Battle Creek, which last-named company, the defendant herein on or about the 2d day of May, 1906, succeeded and assumed the obligations imposed by said mileage book, and which was thereafter repeatedly recognized by defendant as good for the payment of passenger fares." The defendant introduced no evidence. Plaintiff testified that when he purchased this ticket the title of the company was the "Michigan Traction Company." He introduced in evidence a conveyance made by the Michigan Traction Company to the defendant by which the Michigan Traction Company conveyed to defendant all its franchises and property of all descriptions, real and personal, and also "all property which said Michigan Traction Company had purchased from its predecessors at Battle Creek and Kalamazoo in 1898." The description in said conveyance covered the roadbed and route over which the plaintiff was a passenger. The date of the conveyance from the Michigan Traction Company to the defendant was May 2, 1906. Plaintiff further testified that he had traveled over this route from May 2 to October 20, 1906, during which time he had used all the coupons except about 90. On cross-examination he testified he did not know when he bought the ticket what company was operating the road. Plaintiff recovered verdict and judgment.

Argued before GRANT, C. J., and BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ.

Sandford W. Ladd, for appellant.

A. M. & C. H. Stearns, for appellee.

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GRANT, C. J. (after stating the facts as above). It was incumbent upon the plaintiff to prove that he had a valid mileage ticket, good for transportation according to its terms over the defendant's road. The ticket on its face was not issued by the defendant or by its assignor, the Michigan Traction Company. There is no direct evidence of the legal existence of a road known as the "Jackson & Battle Creek Traction Company," or that the defendant acquired the franchises and property of such a company. The ticket itself and its use over defendant's road are the sole facts from which it can be inferred that such a company was once in existence. The deed from the Michigan Traction Company to defendant refers to franchises, rights, etc., purchased from its predecessors, but does not state who they were. If this were the only evidence tending to show the validity of the ticket, plaintiff would fail. His own evidence however, is that he had traveled over the defendant's road frequently between May 2d and October 20th, and that the validity of his ticket was never questioned. The dispute, in consequence of which plaintiff was ejected from the car, did not arise over the ticket, but solely over the number of coupons which should be detached to cover his proposed journey. Shortly after the trouble, one J. M. Bramlet, evidently an officer of the company, wrote a letter to plaintiff regretting the occurrence, and asking for an interview with him. The latter had no reference to plaintiff's contract of transportation.

The record is necessarily meager. We, however, may assume that in the course of its business the coupons taken up by the conductors were turned in to the office of the company, and that its collectors of fares accounted for money and tickets received. Is this evidence that the defendant had assumed the contract which the plaintiff had with the Jackson & Battle Creek Traction Company, and that it was valid? Where a conductor permits a passenger to ride upon an unexpired ticket, or upon tickets good only upon certain trains, common carriers are not estopped by these acts, though often repeated, to thereafter deny the passenger's right of transportation contrary to the terms of his contract. *Sherman v. Railway Co.*, 40 Iowa, 45; *New York, etc., Ry. Co. v. Feely*, 163 Mass. 205, 40 N. E. 20; 28 Am. & Eng. Enc. Law (2d Ed.) 197. Those and similar cases do not, however, apply to this case. It was there held that the acts of the conductor only waived the obligation of the contract as to the specific occasions. They did not change the terms of the contract or extend it. Those cases involved a violation of the plain terms of the contract. In this case the evidence tends to show an assumption of the contract made with some other company and a recognition of the liability of the defendant thereunder. We think the evidence sufficient to sustain the verdict, especially as the defendant offered no explanation of its apparent assumption of the contract, and

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the facts were peculiarly within its knowledge. The evidence above referred to was received under the defendant's objection and exception. It was all legitimate for the consideration of the jury in determining whether the defendant had assumed the plaintiff's contract. They might fairly assume that the defendant would not for months carry out a contract for which it was not responsible.

We find no error in the record, and the judgment is affirmed.

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(Court of Appeals of New York, June 12, 1908.)

[85 N. E. Rep. 153.]

Carriers—Passengers—Ejection—Error in Ticket.*—Plaintiff purchased a mileage book from defendant railroad, the book containing a line, on the back of it, for the signature of the purchaser, preceded by a printed "M," which was to be followed by letters to show the sex and condition of the purchaser, and when plaintiff's name was filled in by the company's agent, the letter "s" was inadvertently omitted, making plaintiff's name read "Mr.," instead of "Mrs.," and when she presented the ticket to defendant's conductor, he refused it, and directed her to return the ticket to defendant's general office, and have it corrected. Plaintiff had previously been refused permission to ride by the same conductor for that reason, and he knew that correspondence had passed between plaintiff and the company regarding the mistake, and that plaintiff was the real owner of the ticket. Held, that even if the conductor would have been justified in assuming, in the absence of knowledge that plaintiff was the real owner, that the ticket had been issued to a man by reason of the title, he was not justified in ejecting her because of the clerical error in the title, if he knew she was the owner, and the requirement that plaintiff should return the ticket to the general office for correction was unreasonable, as the company could have instructed the agent or conductor to make the necessary change.

Same—Regulation—Issuance of Mileage Books—Constitutionality—Retroactive Operation.†—Laws 1895, p. 961, c. 1027, as amended by Laws 1896, p. 758, c. 835, Laws 1897, p. 622, c. 484, and Laws 1898, p. 1326, c. 577, providing that any corporation operating a railroad in this state, the lines of which exceed 100 miles in length, shall issue

*For the authorities in this series on the subject of the liabilities of carriers on account of mistakes or negligence of their ticket agents, see foot-notes appended to *Shelton v. Erie R. Co.* (N. J.), 25 R. R. R. 70, 48 Am. & Eng. R. Cas., N. S., 70.

†See foot-note appended to *Commonwealth v. Atlantic Coast Line R. Co.* (Va.), 22 R. R. R. 1, 45 Am. & Eng. R. Cas., N. S., 1.

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mileage tickets for either 1,000 or 500 miles, which shall entitle the holder thereof, or any member of his family, to travel thereon, are unconstitutional and inoperative as to corporations formed prior to the enactment, but constitutional as to corporations organized subsequent thereto.

Railroads—Consolidation—New Corporation.—Where a railroad corporation was formed out of several prior existing corporations, the consolidated corporation was a new corporation.

Same—Succession to Rights of Original Corporations—Exemption from Statutory Duties—Railroads.—Laws 1895, p. 961, c. 1027, as amended by Laws 1896, p. 758, c. 835, Laws 1897, p. 622, c. 484, and Laws 1898, p. 1326, c. 577, provide that a corporation operating a railroad, the lines of which exceed 100 miles in length, shall issue mileage books for so many miles, which shall entitle the holder, or any member of his family, to travel thereon. Railroad Law (Laws 1890, p. 1104, c. 565, § 72) provides that, upon consummation of the consolidation of several railroads, all the rights, privileges, exemptions, and franchises of each of the corporations consolidated shall be deemed to be transferred to and vested in such new corporation. Defendant's railroad was formed by a number of shorter roads, all being under 100 miles in length, so that the mileage book act did not apply to them, but the consolidated road exceeded that length. Held, that the exemption of the several corporations, before the consolidation, from the mileage book act, was not a right, privilege, or exemption, under section 72, which passed to the consolidated corporation, and hence that section applied to it.

Carriers—Passengers—Tickets—Unauthorized Conditions—Validity—Agreement by Passenger.—Laws 1895, p. 961, c. 1027, as amended by Laws 1896, p. 758, c. 835, Laws 1897, p. 622, c. 484, and Laws 1898, p. 1326, c. 577, provide that any railroad corporation, the lines of which exceed 100 miles in length, shall issue mileage books for either 1,000 or 500 miles, which shall entitle the holder, or any member of his family, to travel thereon. Defendant company issued a mileage book to plaintiff, which contained certain restrictions as to its use, not provided by the statute. Held, that plaintiff was not bound to insist upon the issuance of a mileage books in strict accordance with the statute, and sue for the statutory penalty if it was refused, on penalty, if she accepted the ticket as issued, of becoming bound by its limitations, but that, the company having received the full price of the mileage book as fixed by statute, there was no consideration for any agreement by plaintiff to limit its use further than prescribed by the statute, and plaintiff was not bound by the additional limitation.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Harriet M. Parish against the Ulster & Delaware Railroad Company. From a judgment (113 App. Div. 894, 98 N.

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Y. Supp. 1109) for defendant, plaintiff appeals. Reversed and new trial ordered.

See 99 App. Div. 10, 90 N. Y. Supp. 1000.

W. H. Johnson, for appellant.

Lewis E. Carr, for respondent.

CULLEN, C. J. The action is brought to recover damages for the unlawful expulsion of the plaintiff, on two separate occasions, from the defendant's trains, on which she was a passenger. At the time of these occurrences the defendant issued mileage books, good for 500 miles. By the contract printed in the book the ticket was good only for the person in whose name it was issued, but this provision was modified by the further one: "It will be good for use of family of the person named hereon from September 1st to June 1st only. During months of June, July, and August section 1 [that first quoted] will apply." The plaintiff was aware that, according to the limitations prescribed in the ticket, she could not use her husband's ticket during the three summer months, and therefore had her husband obtain from the local passenger agent a mileage book for her individually. He stated the plaintiff's name, and asked that the ticket be made out to H. M. Parish. It was issued accordingly. On the ticket was a blank for the name of the person to whom the ticket was issued and for the residence of such person. Before the name there was a capital "M" apparently to be followed in script by the letter "r" or the letters "rs" or "iss," depending on the sex and condition of the holder. In this case "r" alone was written after the capital "M," "s" being omitted, and that omission has caused the whole controversy between these parties. The plaintiff testified that on the 6th of August, 1902, she boarded the defendant's train at Hobart, and presented her ticket to the conductor, who refused to accept it; that she explained to the conductor that it was her ticket, and that the prefix of "Mr." instead of "Mrs." was a mistake on the part of the defendant's agent. Nevertheless the conductor, on the plaintiff refusing to pay her fare, ejected her from the train. The next day the plaintiff wrote to the general passenger agent of the defendant at Oneonta a letter complaining of her removal from the train, and also of the discourteous conduct on the part of the conductor, and stated fully the circumstances attending the issue of the ticket. To this letter the agent replied that, if the ticket bore the name Mr. H. M. Parish, the conductor had no right to honor it, adding: "Therefore, so far as that part of the case is concerned, you are entirely at fault, and in order to avoid further trouble, you should have the ticket sent to this office for correction." The plaintiff refused to comply with the demand that the ticket be sent to the defendant's office, which was at some distance from the place where she lived, giving as a reason that she had heard of a ticket

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being sent there and not returned. On August 23d she again sought passage on the train, and on tendering the ticket, it was again refused by the same conductor. The plaintiff said to him that by this time he must know that it was her ticket, to which he replied that she ought to have sent the ticket back, that the agent of the company wrote her about it, and that it was "sheer contrariness" on her part. Thereupon the plaintiff was again put off the train. At the close of the plaintiff's evidence the complaint was dismissed, and the judgment entered on the decision at the Trial Term has been affirmed by the Appellate Division.

The plaintiff recovered on the first trial of this action, but the judgment was reversed by the Appellate Division. 99 App. Div. 10; 90 N. Y. Supp. 1000. On the second trial the case was disposed of in accordance with the opinion rendered on the first appeal. The decision of the Appellate Division was founded on the case of *Monnier v. N. Y. C. & H. R. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619. In the *Monnier Case* a passenger entered a train without having procured a ticket. The conductor demanded from him the extra five cents, allowed by statute where a ticket is not procured at the station. As a condition for exacting this additional fare, the statute required that the ticket office should be open for a period at least an hour prior to the departure of the train. Laws 1857, p. 488, c. 228. The passenger stated that the ticket office had not been open for the required period, and refused to pay the sum demanded. Thereupon he was ejected. It was held that the conductor could have no knowledge on the subject, that he was not bound to accept the passenger's statement, and that as *prima facie* he was entitled to exact the additional five cents, the passenger should have complied with the conductor's demand, obtaining, as his redress, the penalty prescribed by statute for exacting an excessive fare. While some expressions may be found, in one of the opinions rendered for the majority of the court, that a passenger must comply with the demands of the conductor, seeking redress subsequently by appropriate action, only three judges concurred in that opinion. The three judges who dissented held that the passenger was justified in his refusal, and that his expulsion was unlawful. The remaining judge of the court expressed his concurrence in the general doctrine stated by the minority, but denied its application to the case then before the court, solely on the ground that the conductor was necessarily ignorant of the facts, and was justified in acting on appearances. The Appellate Division has said: "It seems too clear for discussion that upon its face the book did not authorize her to ride upon it." I am not inclined to concur in that view, at least unqualifiedly. The designation "Mr." or "Mrs." was a mere matter of courtesy, and no part of the name of the person to whom the ticket was issued. Conceding, however, that, without

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any other knowledge on the subject, the conductor would be justified in assuming that the ticket had been issued to a man, the testimony of the plaintiff tended to show that the conductor personally knew her, and by inquiring he might have found out whether H. M. Parish, whose signature was at the foot of the book, was a man or a woman. But whatever may be the case as to the first expulsion, it is plain that, prior to the time of the second, both the officers of the defendant and the conductor knew that the ticket presented was that of the plaintiff, and had determined to force the plaintiff to comply with their direction to return the ticket to the general office. Therefore the very foundation of our decision in the Monnier Case that the conductor did not know, and could not know, the rights of the passenger is wanting in the present case. The blunder in the form of the ticket was that of the defendant, not of the plaintiff, and the requirement that she should send that to the general office of the defendant for correction was unreasonable, or, at least, the jury might have so found. If it was advisable to correct the ticket, so as to prevent its being used by a man, the company could have instructed its local agent or the conductor to make the necessary change.

Moreover, if the defendant was at the time within the provision of the mileage book act, its justification wholly fails. That statute prescribes that any corporation operating a railroad in this state, the line or lines of which exceed 100 miles in length, shall issue mileage books for either 1,000 or 500 miles, which shall entitle the holder thereof, or any member of his family, to travel thereon. Laws 1895, p. 961, c. 1027, as amended by Laws 1896, p. 758, c. 835, Laws 1897, p. 622, c. 484, and Laws 1898, p. 1326, c. 577. The defendant was organized in 1901 as the result of a consolidation of the roads of several companies. These acts were unconstitutional and inoperative as to corporations formed prior to their enactment (*Beardsley v. N. Y., L. E. & W. R. R. Co.*, 162 N. Y. 230, 56 N. E. 488), but constitutional and controlling as to corporations organized subsequent to that period (*Minor v. Erie R. R. Co.*, 171 N. Y. 566, 64 N. E. 454). The corporation which was formed by the consolidation of several corporations was a new corporation. *Miner v. N. Y. C. & H. R. R. Co.*, 123 N. Y. 242, 25 N. E. 339. The roads of none of the corporations, from the consolidation of which the defendant was formed, exceeded in length 100 miles. Therefore none of them came within the provisions of the mileage book act; but the roads of the consolidated corporations, the defendant, do exceed 100 miles, and it is therefore subject to the provisions of those acts, unless it is exempted therefrom by the statutes under which the consolidation was effected. Section 72 of the railroad law provides (Laws 1890, p. 1104, c. 565): "Upon the consummation of such act of consolidation all the rights, privileges,

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exemptions and franchises of each of the corporation (so consolidated) * * * shall be taken and deemed to be transferred to and vested in such new corporation." The inapplicability of the mileage book acts to the several corporations before consolidation, because none of their roads was more than 100 miles, was in no proper sense a right, privilege, exemption, or franchise of the corporation. *Minor v. Erie R. R. Co., supra.* It is contended, however, that though the defendant did issue mileage books, it incorporated therein certain conditions and restrictions; that while the plaintiff might have insisted upon obtaining the issue to her of a mileage book, with the privileges accorded to the holder thereof by the terms of the statute, and sued for the statutory penalty in case it was refused, nevertheless, by accepting the ticket so issued, she became bound by its limitations and restrictions. We think not. The company received the full price of the mileage book as fixed by the statute, and therefore there was no consideration, for any agreement by the plaintiff, to limit its use to a greater extent than prescribed by the law. If the mileage book was available by any member of the family of the holder, of course the plaintiff's sex was no indication that she was not entitled to use it, even if it had been issued to a man.

The judgment appealed from should be reversed, and a new trial ordered, costs to abide the event.

GRAY, HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur. CHASE, J., not sitting.

Judgment reversed, etc.

PILCHER *et al.* v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Alabama, June 4, 1908.)

[46 So. Rep. 765.]

Carriers—Carriage of Goods—Delay in Transportation—Damages.*

—The damages recoverable from a carrier for delay in delivering goods received for transportation are such as are the natural and proximate results of its acts and such as reasonably might have been expected to be within the contemplation of the parties at the time of entering into the contract, and where the carrier has notice that delay in the delivery will result in an unusual loss there may be a recovery therefor.

Same.*—The measure of damages for delay in delivering goods received by a carrier for transportation is the difference between the market value of the goods at the time of delivery and at the time when by reasonable diligence they should have been delivered, together with incidental damages naturally flowing from the delay, and special damages where the shipper informed the carrier when the contract of shipment was made of special circumstances requiring expedition in the shipment.

Same—Pleading—Complaint.—A complaint in an action against a carrier for delay in the delivery of a car load of stoves, which alleged that there was no market for the stoves at the point of destination, that plaintiff owned teams and hired drivers in peddling stoves, that during the delay in the delivery the teams and drivers were unemployed, resulting in loss to plaintiff, that the carrier, "or its agent, or its agent at" point of destination, knew that there was no market for the stoves, except as above set forth, and that plaintiff was sustaining the expense specially claimed and made necessary by the delay of the carrier, but which failed to allege that any notice was given to the carrier at the time of the making of the contract for shipment of the special circumstances on which plaintiff's claim for damages was based, was insufficient to authorize the recovery of such damages.

Same.*—A notice to a carrier by a shipper of the expense and loss which the shipper will sustain by delay in the delivery of the goods, given subsequent to the execution of the contract of shipment, does not change the contract or the obligation thereon, and does not authorize a recovery of special damages resulting from the delay.

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by J. M. Pilcher and another against the Central of Georgia Railway Company. From a judgment granting insufficient relief, plaintiffs appeal. Affirmed.

*See foot-note appended to Brand v. Illinois Cent. R. Co. (Ky.), 28 R. R. R. 136, 51 Am. & Eng. R. Cas., N. S., 136.

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R. D. Crawford, for appellants.

Espey & Farmer, for appellee.

SIMPSON, J. This action was brought by the appellants against the appellee to recover damages for the negligent delay by the defendant in delivering a car load of stoves, which were received by the defendant as a common carrier at Atlanta, Ga., on the 4th day of September, 1906, to be transported to Taylor, Ala., which said goods reached said Taylor on the 17th of said September. It is claimed in the complaint that three days was a reasonable time within which to carry said goods from Atlanta to Taylor. It is alleged in the complaint that said stoves were of novel form and make; that they were not purchasable anywhere, except at the factory in Atlanta, and there was no market for them at Taylor; that plaintiffs owned three double teams of mules, and hired a driver for each, to be (and were) solely employed in the sale or peddling of the stoves so delivered; that during the time of the delay in the delivering of said stoves said teams and drivers were idle and unemployed; that the expense of feeding the teams was \$3.50 per day, and the wages of the drivers \$7.50 per day; and also that "the defendant, or its agent, or its agent at Taylor, were fully aware and knew that there was no market for said stoves, except as above set out, that plaintiffs were sustaining the expense herein specially claimed, and that said expense was made necessary by the delay in the delivery of the said goods." On motion of the defendant the court struck from the complaint the allegations in regard to the special damages, and a verdict and judgment was rendered for the plaintiffs for \$1.

The only evidence was the testimony of the plaintiffs, showing the shipment, the distance from Atlanta to Taylor, 260 miles, with three junction points, and the usual time of travel, three days; that the stoves, were protected by patents; that he bought them at the factory, and that the company did not sell to jobbers, etc., but only to the retail dealer; that witness conducted his business, by loading five stoves on each wagon, on Monday morning, and sending his drivers (who were also salesmen) with them, who traveled from house to house and sold during the week; that said teams and drivers were idle during the delay, at the expense stated; that on September 5, 1906, he notified defendant's agent at Taylor and the agent at Slocumb "of the expense and loss sustained by him during the delay in delivery, and that said stoves could not be purchased in car load lots except from the factory at Atlanta." The assignments of error are to the action of the court in striking the parts of the complaint, and in giving, on the written request of the defendant, the charge: "If the jury believe the evidence in this case, they cannot find for the plaintiffs more than nominal damages."

The law is well settled that for delay in delivering goods received by a common carrier for transportation the damages re-

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coverable are such "as are the natural and proximate results of" the carrier's acts, and "such as reasonably might have been expected to be within the contemplation of the parties at the time of entering into the contract as the probable result of a breach; and where the carrier has notice of the fact that a delay in the delivery of the goods will result in an unusual loss or some special damage to the shipper there may be a recovery of the actual damages sustained where the notice was of such character that it will be presumed that the carrier contracted with reference thereto."

3 Joyce on Damages, § 1956. This matter is ably and exhaustively discussed, and the numerous cases cited and analyzed, in the last edition of Hutchinson on Carriers, where it is shown that the general rule of damages for delay is the difference between the market value of the goods at the time of delivery and at the time when by reasonable diligence they should have been delivered. In addition, the carrier may be liable "for such other and incidental damages as naturally and proximately flow from the delay"; but "it is the well-settled rule that special damages can be recovered from the carrier, when the transportation has been delayed, only where it is shown that the shipper informed the carrier, at the time the contract was made, of the special circumstances requiring expedition in the shipment, * * * and although the carrier may have been notified of such special circumstances in time to have prevented a delay, if such notice was given after the contract of transportation had been entered upon, it would not operate to modify the contract, or subject the carrier to liability for special damages arising from a subsequent delay." This is said to be a crucial fact, which must be both alleged and proved. 3 Hutchinson on Carriers (3d Ed.) pp. 1617-1627, §§ 1366-1368, inclusive, with notes and cases cited.

Referring to the complaint and the motion to strike, it does not allege that any notice was given to the defendant, at the time of making the contract, of the special circumstances on which the claim for special damages is based, but only that the defendant, or its agent, or its agent at Taylor, "were fully aware and knew that there was no market," etc. In the first place, this falls far short of alleging such special notice as to raise the presumption that such damages were within the contemplation of the parties at the time of making the contract. In the second place, besides not alleging when the defendant or its agent had such notice, even if we could presume that it meant at the time the contract was made, it is difficult to understand how the fact that the agent at Taylor had such notice could raise any presumption that the parties to a contract made by another agent at Atlanta, 260 miles away, could have in contemplation the special damages claimed. Looking to the evidence as detailed in the bill of exceptions, it is not claimed that any notice of special circumstances was given at the time of making, but it is stated only that on Sep-

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tember 5th, the day after the contract was entered up, the notice was given to the agents at Taylor and Slocomb of the expense and loss sustained by the plaintiffs. This, of course, according to the authorities and according to sound reason, could not change the terms of the contract or the obligations thereon. Consequently there was no error in the action of the court, and the judgment of the court is affirmed.

Affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

BESECKER v. DELAWARE, L. & W. R. Co.

(Supreme Court of Pennsylvania, March 30, 1908.)

[69 Atl Rep. 1039.]

Carriers—Injury to Passenger—Evidence.*—In an action by a passenger, who, after the station had been announced, alighted from the car, and was struck while crossing the track between his train and the station by another train running on the intervening track in violation of the rules of the company, evidence held to sustain verdict for plaintiff.

Same—Negligence.*—Where passengers are alighting from a train at a station, and going from the platform to the station, it is negligence per se for the railroad to permit a train to pass on an intervening track.

Appeal from Court of Common Pleas, Monroe County.

Action by George Besecker against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

A. Mitchell Palmer, for appellant.

Rogers L. Burnett, for appellee.

MESTREZAT, J. On the morning of November 20, 1905, George Besecker, the plaintiff, purchased a round-trip ticket at Henryville over the defendant company's road to Portland and return. In returning, he took a west-bound train leaving East Stroudsburg station at 7:15 p. m. He entered the smoking car, the rear car of the train, and seated himself on the left-hand side and in the third or fourth seat from the front of the car. As the train

*See foot-note appended to *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487.

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approached Henryville, the rear brakeman, who was seated in the rear end of the smoking car, announced that station twice, having previously announced, as the train left the last station, that Henryville was the next stop. The brakeman then opened the front door of the smoking car, passed through the vestibule of that car and the vestibule of the next coach, which was a coach for ladies, and announced Henryville station twice in that car. He then returned to the front end of the smoking car, opened the vestibule door of the smoking car, and turned to open the vestibule door of the ladies' coach. The plaintiff arose from his seat, passed out the front door of the car and down the steps through the vestibule, and, as the smoking car was about opposite the waiting room door of the station, he alighted. The plaintiff claims that, when he alighted, the train had stopped and he stepped off. The defendant claims that the plaintiff alighted while the train was in motion, and that he jumped off. At Henryville the defendant company has two main tracks, east and west bound. The station is on the south side of the east-bound track. As Besecker had arrived on a train on the west-bound track, he was obliged to cross the east-bound track, to reach the station. After alighting from the train, he started towards the station, and, after taking a step or two, was struck and injured by the bumper beam of the engine drawing an east-bound coal train, running at the rate of 12 to 15 miles an hour. The plaintiff, it is conceded left the car at the place where passengers for that station usually and ordinarily alight. It is claimed by the defendant company, and its testimony tended to show, that the engineer of the passenger train saw the coal train approaching on the east-bound track, and, realizing that it would cut his passengers off from the Henryville station, he kept his own train moving until the smoking car had overlapped the engine of the coal train when the passenger train stopped.

This is an action by the plaintiff to recover for the injuries he sustained, and the alleged negligence consists in the defendant company running the coal train by the Henryville station on the east-bound track without notice of its approach to the station or other warning while the plaintiff was attempting to cross that track to get to the station. It is properly conceded by the learned counsel of the defendant company that, if the passenger train had stopped at the station, it was negligence on the part of the company to allow the coal train to run between the passenger train and the station while the passengers were being discharged. It is contended, however, by the counsel that the plaintiff alighted from the train while it was in motion, that this was negligence, and that his injuries resulted from this negligent act on his part. It is further claimed by the defendant's counsel that the moving of the passenger train was notice to the passengers that there was danger, and that, therefore, they had no right to alight from the

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train while it was in motion. The court, however, instructed the jury that the bare fact of the plaintiff stepping off the train, even though it were in motion, would not of itself be such contributory negligence as would prevent a recovery in the case. It will therefore be observed, as suggested by the learned trial court, that the only question before the court and jury was whether the plaintiff was guilty of contributory negligence. The only question which we need consider is whether it was negligence per se for the plaintiff to alight from the train while it was in motion and attempt to cross the east-bound track to reach the station. If it was, the instructions of the court just alluded to were erroneous. There was ample evidence to support the defendant's contention that the plaintiff did leave the train while it was in motion, and, if his act in doing so was negligence of itself, the jury should have been so instructed. It is well settled that the duty of a carrier of passengers is not fully discharged until it has set the passenger down in a place of safety at his destination. It must not only carry him to his destination in safety, but it must provide a safe place to discharge him when he arrives there. This is conceded to be the law. If, instead of discharging its passengers at a station on the side of the track, the carrier discharges them between its tracks and obliges them to cross one or more tracks to reach its station, an imperative duty devolves upon the carrier to see that the passenger will not be endangered in crossing the tracks. This duty is imposed by the contract which the carrier enters into with the passenger when he purchases his ticket. While its passengers are alighting from its train and proceeding across the tracks to the station, it is clear negligence for it to permit a train to pass upon one of the intervening tracks, thereby endangering the safety and the lives of the passengers. Under those circumstances, the passenger has a right to assume that his safety will not be endangered by permitting a train to pass upon the intervening tracks while he is in the act of crossing to the passenger station, and he may rely upon the company to keep the tracks clear. *Flannagan v. P., W. & B. R. R. Co.*, 181 Pa. 237, 37 Atl. 341; *Harper v. Pittsburg, etc., R. R. Co.*, 219 Pa. 368, 68 Atl. 831; *Atlantic City R. R. Co. v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. Rep. 652; *Chicago, etc., Ry. Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131. Before attempting to cross the tracks under such circumstances, the passenger is not always required to observe the rule which compels a person crossing tracks of a railroad on a highway to stop, look, and listen before he attempts to cross. His obligation may be totally different from that of a person at a public crossing. *Pennsylvania Railroad Co. v. White*, 88 Pa. 327; *Betts v. Lehigh Valley Railroad Co.*, 191 Pa. 575, 43 Atl. 362, 45 L. R. A. 261. The great current of authority is to the effect that failure to look for trains

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when crossing a track in passing from the train to the station is not necessarily negligent. Per Collins, J., in *Atlantic City R. R. Co. v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 45 L. R. A. 671, citing two of our cases referred to above. The reason of the rule is that the carrier is required to provide a safe place to discharge its passengers, and hence they have a right to assume that, in the performance of that duty, the carrier will not permit a train to pass on the intervening tracks while they are going from the train to the station. Of course, the passenger in crossing the tracks is not relieved from the exercise of ordinary care under the circumstances, and whether he performed that duty is for the jury.

Conceding, therefore, that it was negligence in the defendant company to permit its coal train to be run on the intervening track if the plaintiff alighted from the passenger train after it had stopped, was it negligence in the plaintiff to alight from his train while it was in motion, and to attempt to cross the tracks to the station? This is the real and only question in the case. As we have seen, the defendant's counsel contend that such action on the part of the plaintiff was negligence, that he had no right to alight from the train while it was in motion, and the fact that it had not stopped, although at the usual place for trains to stop at that station, was notice to the passengers that alighting from the train would be dangerous. On the argument of the case the writer was impressed with this position, but upon subsequent reflection we are satisfied that it is not tenable. As this train approached the station the company's brakeman announced the approach, and made preparation for the passengers to alight by opening the door of the car and the door leading from the vestibule to the station. His train being a regular passenger train, the plaintiff had a right on its arrival at Henryville to assume that the place for discharging passengers from west-bound trains was safe, and that their safety would not be endangered while crossing the intervening tracks of the carrier company to the station. No notice or warning was given the passengers by the company's servant of any danger at the station or that a train was approaching on the other track. The situation at that time, then, was that the passengers had been notified by the brakeman that their train was approaching the Henryville station, the doors permitting exit from the car had been opened to enable the passengers to alight, the train had lessened its speed so as to be moving quite slowly, no notice of any danger on the intervening tracks had been given, and the passenger train was at the usual and ordinary place for discharging passengers at Henryville. While these facts would not justify the negligent act of a passenger in alighting from a moving train, yet it was the duty of the carrier company to keep the intervening tracks free from

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danger to any passenger who, having alighted from a west-bound train at that time, desired to go to its station, and especially to enforce its own rule and prevent a train passing in either direction on the east-bound track. The plaintiff had a right to assume that the company would perform this duty, unless he had notice that there was danger on the intervening track or that a train was approaching at that time. The mere fact that the train was in motion was not of itself notice to the passengers that the carrier would not perform its duty and keep its other track clear at that time. Philadelphia, W. & B. R. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483. In that case the train was in motion when the passengers alighted, and the Maryland Court of Appeals in sustaining a verdict in favor of the passenger who had been injured in crossing the track by a passing train said (page 519 of 72 Md., page 2 of 20 Atl., and page 676 of 8 L. R. A. [20 Am. St. Rep. 483]): "If the discovery of the approaching train caused any change of purpose on the part of the conductor, it would have been reasonable to communicate this change to the passengers, whose safety might be affected by it." It is true that the defendant company alleges that notice was given to the plaintiff of the approach of the train on the other track, but this was denied by him, and, of course, was a question for the jury. If the plaintiff had been injured in alighting from the moving train by having been thrown or having fallen against something or in any other way, and this action had been brought to recover damages for such injury, of course, there could be no recovery; but he was not injured when he was alighting from the train or by anything he did while alighting from the train. He reached the ground in safety. The peril involved in alighting from the train was passed before he attempted to cross the tracks. That was a negligent act, but it was not the proximate cause of his injuries. This action was not brought to recover damages for injuries he sustained while descending from the car. The plaintiff assumed a risk in alighting while the train was in motion, but that assumption of risk cannot be extended so as to protect the company in its subsequent negligent act by which the plaintiff was injured while he was still under its protection as a passenger. Suppose the plaintiff had alighted from the train while it was at rest, and in going to the station was injured by something which had been negligently and improperly left between the rails of the east-bound track or on the station platform, the company clearly would have had no defense to an action brought to recover damages for his injuries. Its liabilities would have been the same as though the plaintiff, having alighted under those circumstances, had been struck by a train approaching on the east-bound track. In both cases the carrier company is liable because the plaintiff is still a passenger

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and is entitled to its protection while he is crossing its track and passing through its station. In the case in hand, conceding the plaintiff to have alighted while the train was in motion, he is entitled to the same protection from the carrier company while he is crossing its tracks. He was not injured while alighting from the train, but from the negligent act of the company while he was crossing its east-bound track.

The case of *Philadelphia, W. & B. R. R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483, decided by the Maryland Court of Appeals, is in point. The accident occurred upon the defendant company's road at the city of Chester, in this state. The name of the station was announced as the train approached the city, and it stopped at the eastern end of the station platform. Before the plaintiff could alight, the train had started, and while it was moving slowly he stepped from the car and was immediately struck by a train coming from the opposite direction. The court held that his negligence was for the jury. In the opinion it is said (page 519 of 72 Md., page 4 of 20 Atl., and page 676 of 8 L. R. A. [20 Am. St. Rep. 483]): "He made his exit from the car in safety, but was immediately confronted by a great danger. If he had looked forward, he might have seen and avoided it. But here we must bear in mind the circumstances attending his exit from the cars. He was getting off at a place which, with the knowledge and permission of the defendant, was habitually used for this purpose; and he knew, moreover, that it was the defendant's duty to use all possible care to make this place safe for him. And he knew that by a special rule it had declared that when his train was discharging passengers, any approaching train must be stopped and not be allowed to reach it. Now, assuming that he supposed that he was to be discharged as a passenger at that place, he would necessarily and unavoidably infer that he would be safe, if the railroad company observed this rule. Undoubtedly he had a right to assume that this rule would be enforced, and, relying upon the assurance guaranteed by the rule, he was dispensed from the necessity of using the degree of care ordinarily required of persons who go on or near railroad tracks." In *Chicago, etc., Ry. Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131, the passenger alighted from the train when it was in motion, and was subsequently struck by an engine coming from the opposite direction while he was crossing the track to reach the station. The defense was contributory negligence, and the defendant company asked the court to instruct the jury to find for it on that ground. The prayer was refused, and there was a verdict for the plaintiff which was sustained on appeal by the Supreme Court of the United States.

In the case in hand the plaintiff knew of the existence of a rule of the carrier company similar to the one in the *Anderson Case*, and the remarks of the court in that case apply, therefore, to the

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plaintiff here. He had a right to assume that the defendant company would observe its own rule (*Lyman v. Boston & Maine Railroad Co.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364), and therefore, although having alighted from the train while in motion, he had a right to rely upon the defendant company keeping its intervening track clear at the time for receiving and discharging passengers from its west-bound trains at Henryville. As said in *Atlantic City Railroad Co. v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 45 L. R. A. 671: "Goodin [the passenger] had a right to rely on the assumption that no train would be allowed to come while passengers might properly be crossing the track." Reasonable care according to the circumstances was required of the plaintiff when he attempted to cross the defendant's tracks; and whether he exercised that care or not was a question for the jury. The court could not declare as matter of law that in alighting from the train while it was in motion the plaintiff contributed to the injuries he sustained.

The judgment is affirmed.

CHICAGO GREAT WESTERN RY. CO. v. MOHAUPT.

(Circuit Court of Appeals, Eighth Circuit, June 2, 1908.)

[162 Fed. Rep. 665.]

Carriers—Injury to Passenger—Contributory Negligence.*—An adult person traveling on a railroad train, who, several blocks before the train reached a station, and while it was moving at a speed of 10 miles an hour, voluntarily and without necessity left the car in which he was seated and stood upon the open platform, and while so riding was killed in a collision with another train standing at the station, no passenger in the cars being seriously injured, was chargeable with contributory negligence which precluded a recovery from the company for his death.

A. G. Briggs and *John L. Erdall*, for plaintiff in error.

C. D. O'Brien, *R. D. O'Brien*, and *E. W. Williams*, for defendant in error.

In error to the Circuit Court of the United States for the District of Minnesota.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

*See foot-notes appended to *Wagner v. Atlantic Coast Line R. Co.* (N. Car.), 28 R. R. R. 735, 51 Am. & Eng. R. Cas., N. S., 735; foot-notes appended to *Gregory v. Elmira Water, L. & R. Co.* (N. Y.), 27 R. R. R. 302, 50 Am. & Eng. R. Cas., N. S., 302; first foot-note appended to *Forbes v. Chicago, etc., Ry. Co.* (Iowa), 26 R. R. R. 714, 49 Am. & Eng. R. Cas., N. S., 714.

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ADAMS, Circuit Judge. This was an action for damages instituted under the statutes of Minnesota by the personal representative of Edward Mohaupt, deceased, for alleged negligence of defendant's servants and agents in the operation of one of its trains of cars. The defenses were twofold: (1) That decedent was a trespasser on the train, and that defendant was not guilty of any wanton or willful disregard of his rights; and (2) that he so exposed himself to danger as to contribute to the injury sustained by him. The decedent took one of the passenger trains of the defendant company somewhere between St. Paul and Minneapolis, to be carried to the latter place. The proof discloses that there was a tacit understanding between him and the conductor of the train that he should be carried free, and pursuant to such understanding he paid no fare for his transportation. As the train approached Minneapolis station, it collided with the rear end of another train standing at the station, and decedent was crushed and killed. For some six blocks before reaching the station, and while the train was moving at a rate of about 10 miles an hour, decedent had been riding on the rear, open or unvestibuled, platform of the smoking car, having before that time left the smoking car in which he had been riding, and which afforded ample room and safe accommodation for him, and was standing on the platform when the fatal collision occurred. No person inside the cars was seriously hurt by the collision.

At the conclusion of the testimony, the court was asked to direct a verdict for the defendant on two grounds, one because decedent was not a passenger, but a mere trespasser, and, again, because of his own contributory negligence, but refused to do so, and this action affords the basis of one of the assignments of error. The argument is made that the conductor had no authority to permit decedent to ride free on the train; that he was a trespasser in so doing, and as such could exact only a low grade of care from the defendant company, and attention is called to the case of *Condran v. Chicago, M. & St. P. Ry.*, 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749, and *Purple v. Union Pacific R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, as authority for the proposition that the only duty legally imposed upon defendant in such circumstances was not to willfully or recklessly inflict injury upon him, and it is urged that the proof shows neither willfulness nor recklessness on the part of defendant company.

The court below ruled that the decedent was neither a trespasser nor a passenger, but a licensee, and that as such he was entitled to the observance of ordinary care by the defendant railway company. This conclusion is strenuously resisted by defendant's learned counsel. They claim that the proof brings the case well within the rule announced in the foregoing cases, and that the trial court erred in not applying that rule to this case. We, however, in view of the conclusion reached on the other ground

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urged for the peremptory instruction, do not deem it necessary to pass upon the merits of this one.

There is no substantial proof that defendant had any reasonable ground or excuse for riding on the platform of the car. The smoking car in which he had been riding before he took his position on the platform afforded him ample room and accommodation. There were but few passengers in it. So, likewise, the car next to the smoking car and immediately behind the platform on which he was standing contained many vacant seats, in any one of which he could comfortably and conveniently have ridden into the station. If he had remained in the smoking car where he was, he would have been uninjured, as no one there was hurt by the collision. He was an experienced brakeman and selected the dangerous place upon the platform when other safe and convenient places were available to him. Instead of relying on the well-established rule of law and practice which require railway companies to bring their passenger trains to a full stop at stations and remain so until all persons have had a reasonable opportunity to alight and remain inside the car until it arrived at the station, for some unexplained reason he voluntarily, and without any compulsion or inducement by defendant's agents or servants, left the car at least six blocks away from the station and took the platform at a time when the train was not slowing up for the station, but was moving rapidly, and remained there until his fatal injury was received. The theory that he went so long before the train reached the station to make ready to alight when it should arrive has no support in the proof, and, even if such were the fact, it would not, unless in exceptional circumstances, have justified him in exposing himself to the unnecessary peril.

The rule is well settled that:

"Where the railway company has provided a safe and secure place for passengers to ride within its cars, a passenger who voluntarily and unnecessarily takes a position upon the platform of a car while the train is in motion will, in so doing, be chargeable with such contributory negligence as will preclude him from the right to recover for an injury which would not have befallen him had he been in his proper place." 3 Hutch. on Carriers, § 1197; 3 Thomp. Com. on Law of Negligence, § 2947; Beach on Contributory Negligence, § 149.

This court, in *St. Louis, I. M. & S. Ry. Co. v. Leftwich*, 117 Fed. 127, 54 C. C. A. 1, observed that:

"Platforms and steps of railway cars propelled by steam are dangerous places for passengers to ride. They are not provided for that purpose, and passenger coaches generally carry on their doors, or in other conspicuous places, notices that the rules of railway companies forbid the passengers to occupy these places for the purpose of riding upon the trains. Moreover, it is a general rule of law that a passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway

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car * * * is guilty of negligence which, if it contributes to an injury that he sustains, will bar his recovery of damages therefor on account of the concurring negligence of the railway company."

In *Hickey v. Boston & Lowell R. R. Co.*, 14 Allen (Mass.) 429, the Supreme Judicial Court of Massachusetts considered what would be "reasonable cause" for a passenger to ride upon a platform, and there said:

"If, then, the position upon the platform was taken voluntarily, and without reasonable cause of necessity or propriety, the plaintiff fails to show that her intestate was in the exercise of due care and caution. An eager desire to be first in, to arrive at the front rather than at the rear of the train is certainly not such reasonable cause. Ordinarily no accident occurs to those who rush out of the train or rush into the cars at stations, before the trains fairly come to a stop or after it is in motion again; but it cannot now be questioned that those who do so take upon themselves all the risks which attend such a practice."

In *Fletcher v. Boston & M. R. R.*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414, a case was under consideration where the plaintiff was injured while standing upon the upper step leading from the platform of a car. The court said:

"Plainly, if he had remained in the car until the train stopped, this danger would have been avoided. But he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury, which common experience has shown is incident to standing upon the platform of a moving railroad car. The fact that the station had been announced, and the train was being reduced in speed preparatory to stopping, or that the combination of conditions causing the accident was peculiar, and not ordinarily to be anticipated, does not furnish a sufficient excuse for his conduct"—citing *Manning v. West End Ry.*, 166 Mass. 230, 44 N. E. 135.

We are aware of the frequent practice of travelers to needlessly rush to the door of the car and sometimes out upon the platform before the train comes to a full stop, merely to expedite their departure from the train; but the open platform when the train is in motion is a dangerous place, and the practice of resorting to it, except for some urgent and good reason, is against the dictates of common prudence and ought not to receive judicial sanction. Ordinarily, it is only a fancied necessity which prompts it, and it is a reasonable thing to require the passenger to forego the practice except at his own peril in case of accident. We think the decedent contributed to the terrible misfortune which befell him, and that no recovery can be had by his personal representatives on account of it. The court below should have so instructed the jury.

The judgment is reversed, and the cause remanded for a new trial.

KELLY *v.* NEW YORK CITY RY. CO.

(Court of Appeals of New York, April 24, 1908.)

[84 N. E. Rep. 569.]

Carriers—Street Railroads—Transfers—Change of Direction—“Trip”—“Continuous Trip.”*—Railroad Law (Laws 1890, p. 1127, c. 565, § 104, as amended by Laws 1892, p. 1406, c. 676) requiring every street railroad company to carry between any two points on the roads over which it has the right to run cars any passenger desiring to make “one continuous trip” between such points for a single fare, and to give the passenger a transfer entitling him to “a continuous trip” to any point on the road, for the promotion of public convenience by the operation of railroads “as a single railroad with a single rate of fare,” does not prevent a street railway company authorized by section 4, subd. 8, to regulate the time and manner in which passengers shall be transported, and the compensation to be paid, from adopting regulations requiring passengers making use of transfers to use the same only in the same general direction of their initial trip; a trip conveying the idea of transportation in one direction, and a continuous trip, like a continuous line, extending in the same general direction.

Same.—A railroad corporation in operating a single system may operate two or more lines of road between its terminals, but a passenger purchasing a ticket to his point of destination has no option to take a circuitous route, and he is confined to the through route.

Same.—A railroad corporation, subject to the reserved power of the Legislature to alter its character, has a right to exist under conditions as favorable as a sound state of policy, a due regard for the public interest, and a reasonable interpretation of the law will permit, and it should not be burdened by unnecessary implication of a legislative meaning beyond what those considerations demand; and when the Legislature in unmistakable terms, and within constitutional limits, has exercised its power to regulate corporations, it should be given full effect, but no inferences unfavorable to reasonable operation of the franchise of a corporation should be allowed from words susceptible to use in more than one sense.

Cullen, C. J., and Chase, J., dissenting.

Appeal from Appellate Term.

Action by Peter C. Kelly against the New York City Railway Company. From an order of the Appellate Division (119 App. Div. 223, 104 N. Y. Supp. 561) reversing an order of the Appel-

*For the authorities in this series on the subject of street railway transfers, see first foot-note appended to *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629; *Birmingham Ry., etc., Co. v. Turner* (Ala.), 28 R. R. R. 624, 51 Am. Eng. R. Cas., N. S., 624.

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late Term (52 Misc. Rep. 585, 102 N. Y. Supp. 742), reversing a judgment for defendant, plaintiff appeals. Affirmed.

Paul M. Pelletreau, for appellant.

James L. Quackenbush, for respondent.

GRAY, J. The plaintiff in this action seeks to recover of the defendant a penalty of \$50 for a violation of the provisions of section 104 of the railroad law (chapter 565, p. 1127, Laws 1890, as amended by chapter 676, p. 1406, Laws 1892). In the Municipal Court, where the action was brought and tried, the defendant had judgment. On appeal to the Appellate Term that judgment was reversed, and judgment was ordered for the plaintiff, with leave to the defendant to appeal to the Appellate Division. In that court the determination of the Appellate Term was reversed and the judgment of the Municipal Court was affirmed; leave being given to the plaintiff to further appeal to this court.

These were the facts: The plaintiff entered a south-bound car of the Third Avenue line at Bayard street in the Bowery, paid his fare of five cents, and was given a red transfer ticket, which he made use of upon a west-bound car on Chambers street. At West Broadway he left the car and boarded a north-bound car of the Eighth Avenue line. He tendered his transfer ticket to the conductor; but he refused to accept it, and the plaintiff was compelled to pay a further fare of five cents to reach his destination at Leonard street. Under a rule of the defendant the conductor could not accept a south-bound transfer upon a north-bound car, moving in a northerly direction. The defendant, under certain contracts of lease, was operating the several street car lines as one system. The provisions of section 104 of railroad law relating to street surface railroad corporations which have contracted for the lease or consolidation of other roads are as follows: "Every such corporation entering into such contract shall carry or permit any other party thereto to carry between any two points on the railroad, or portions thereof embraced in such contract, any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare." The question is whether the statute operated to prevent the defendant from regulating by any reasonable limitation the carriage of a passenger upon its lines for a single fare. In exercising the power "to regulate the time and manner in which passengers and property shall

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be transported, and the compensation to be paid therefor," conferred by subdivision 8 of section 4 of the railroad law, had it the right to promulgate a rule, which, in effect, would prevent a passenger from reversing the direction of his trip on its railroad system without paying another fare? Under the regulation as made a passenger entering a south-bound car on any of its longitudinal lines on Manhattan Island was entitled, upon payment of his fare, to receive a red transfer, which would carry him, without a further payment, to the southernmost point of its system, and upon any east or west bound car of any intersecting cross-town line. If a passenger entered a north-bound car, he was entitled to a green transfer, upon which he might travel to the northernmost point of the system, with a similar right of taking any east or west bound car on cross-town lines. If a passenger entered a cross-town car, in the first instance, he was entitled to a white transfer, which, upon boarding any north or south bound car on intersecting longitudinal lines, would entitle him to receive from the conductor a red or a green transfer in exchange for his white ticket, according to the direction in which he was then bound. The limitation upon the passenger's privilege of traveling upon the defendant's car lines for one fare was that his trip must be continuous in the one general direction, as evidenced by the color of his transfer ticket. With this sole limitation, he could ride on any intersecting cross-town lines, and on any of the longitudinal lines reached thereby.

It is contended that by force of the provisions of the statute no limitation could be imposed upon the right of transfer, and that a transfer ticket must be available in any direction, according to the desire or whim of the holder. I am unable to assent to a construction of the statute which finds no just support in a fair reading of its language, and which would impose so onerous a burden upon the defendant. A passenger under such a construction would be able to accomplish a round trip on the defendant's lines for one fare. In this instance the plaintiff, upon the one fare paid on entering the south-bound car on the Bowery, under his interpretation of the law, could have continued northerly from Chambers street on West Broadway to Canal street, and there have boarded an east-bound car on the Canal Street line, which would have returned him to the Bowery near to his starting point, or he could have taken a still more circuitous route. The transfer privilege permits of an hour's stoppage at transfer points, and it can readily be seen how far-reaching is the plaintiff's contention. I do not think that the statute intended to confer any such extraordinary right, and, in my opinion, the regulation of the defendant was a reasonable one, and not in contravention of the statute. It was as liberal in the privileges which it accorded to the traveling public as it was possible for the company to be, short of allowing a round trip upon payment of a single fare. It might happen, as in this case, that the passenger was taking as direct a

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route by the use of street railway lines as was possible from the point at which he boarded the car of the Third Avenue line to the point at which he left the car of the Eighth Avenue line. It is manifest, however, with the enormous number of passengers carried daily to and fro upon the defendant's cars, 30 to 40 per cent. of whom are transferred, that it would be almost, if not quite, impossible by any plan workable under congested conditions of travel to provide for a transfer that would indicate the destination of a particular passenger, intending, in good faith, to reverse his direction of travel by taking the third side of a quadrilateral route. But, independently of this practical view of the subject, I do not think that the provision of the statute, when fairly considered, is susceptible of the construction which is sought to be placed upon it. What was intended by the Legislature when authorizing a leasing or consolidation of competing lines of railroad appears to have been the attaching of a condition, by which the public would gain some advantage from it and its convenience be promoted thereby. That condition was that the contracting companies should "carry * * * between any two points on the railroad or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare." The statute more or less defines the scope of the legislative enactment in the language used: "That the public convenience might be promoted by the operation of the railroads as a single railroad with a single rate of fare." But a single railroad would never be required to give to a passenger a return transfer for one fare, and it is hardly conceivable that it should be. A trip ordinarily conveys the idea of transportation in one direction. Unless connected with some other expression, it does not carry the idea of a return. A "continuous trip" does not add to the import. A continuous trip, like a continuous line, is supposed to extend in the same general direction. See *People v. Boston, etc., R. R. Co.*, 12 Abb. N. C. 230. If this statute is to be interpreted as imposing any such double obligation, it would be subjecting the defendant to a burden, to which no single railroad is ever subjected. A railroad corporation in operating a single system may operate two or more lines of road between its terminals; but a passenger purchasing a through ticket to his point of destination would have no option to take a circuitous route. He would be confined to the through route. See *Bennett v. N. Y. C. & H. R. R. Co.*, 69 N. Y. 594, 25 Am. Rep. 250; *Cronin v. Railway*, 144 Mass. 249, 10 N. E. 833.

The contract of the defendant in this case did not differ with respect to its right to regulate the carriage of the passenger from the usual contract of a carrier, except so far as it was affected by the statutory provision. The defendant was required to carry him upon the several lines which it operated for a single fare, and with the right to a transfer, but "substantially as a single railroad with a single rate of fare." If the Legislature had intended

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to require railroad companies coming within the purview of the statute to carry a passenger for a single fare in a reverse direction from that in which he started, or on a round trip, as the result would certainly be in the great majority, if not all, of the cases, it would not have resorted to the comparison "of a single railroad" to express its object. Those words have their distinct place in construing the provision, and they enlighten our understanding of its purpose. The statute should be read in the light of the habitual method of the railroad transportation of passengers, which is to require one fare for a trip upon its line, and another fare for a return trip. That is the reasonable construction which I think should be given to this statute. That sufficiently effectuates the policy of the state in requiring as a fair return for the privilege of contracting for the operation of competing lines as one system under one control such facilities in the way of a single fare and of a free transfer on the several lines as will promote the public convenience. That convenience has been consulted and promoted sufficiently, and indeed more amply perhaps than was essential, when the defendant, treating its railway system on Manhattan island as a single railroad, promulgates a regulation as to transfers, which permits a passenger to travel upon any or all of its northerly or southerly lines of railway for a single fare, provided only that he continue in the same direction, and enables him to ride on any of the cross-town lines which may intersect the line upon which he may happen at the time to be proceeding. I think that the Legislature did not intend so unreasonable a scheme as the appellant contends for, and that to attribute to it an intention to compel the defendant to carry passengers, without limitation as to direction, would be to impute harshness and injustice where none was necessary, and which the language of the enactment does not import. A railroad corporation, however artificial a person in contemplation of law, and however subject its charter to the reserved power of the Legislature to alter, has a right to exist under conditions as favorable as a sound state policy, a due regard for the public interest, and a just and reasonable interpretation of the law will permit. It should not be burdened by unnecessary implication of a legislative meaning beyond what those considerations demand. When the Legislature in unmistakable terms and within constitutional limits has exercised its power to regulate corporate operations, it should be given full effect by the courts; but no inferences unfavorable to a reasonable operation of its franchises should be allowed from words susceptible of use in more than one sense.

For these reasons, I advise that the order of the Appellate Division should be affirmed.

HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.
CULLEN, C. J., and CHASE, J. dissent.
Order affirmed.

LOUISVILLE & N. R. Co. v. NEW ORLEANS TERMINAL Co.

(Supreme Court of Louisiana, Feb. 17, 1908. Rehearing Denied March 16, 1908.)

[45 So. Rep. 962.] •

Railroads—Sale under Decree—Bona Fide Purchaser—Contracts.—

An unrecorded agreement between two steam railroads relative to the cost of maintaining a common crossing in a public street and of furnishing all necessary appliances, including an interlocking signal system, is null and void as to a third corporation purchasing, without notice, the property and franchises of the debtor railroad corporation.

Same—Railroads Crossing Other Railroads—Expense.—The ordinances of the city of New Orleans provide that the expense of maintaining common crossings in public streets shall be equally divided between street railroads crossing each other, and shall be borne entirely by a steam railroad crossing a street railroad. By a parity of reason such expense should be divided equally between steam railroads crossing each other.

Eminent Domain—Appropriation—What Constitutes.—The crossing of the plaintiff's track by the rails and cars of the defendant was not an appropriation of the property of the former to the use of the latter, but a mode of exercising the public right of transit over the street.

Railroads—Crossing Other Roads—Expense.—As plaintiff's right of passage in the streets is subject to the rights of the public or of other railroads duly authorized by the municipality, to use the same streets in the exercise of the public right of transit, there is no basis in reason or equity for plaintiff's demand on defendant for the entire cost of an appliance, required by law, for the protection of the public and both railroads against accidents at their common crossing.

(Syllabus by the Court.)

Appeals from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by the Louisville & Nashville Railroad Company against the New Orleans Terminal Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Denégre & Blair and *Victor Leovy*, for appellant.

Farrar, Jones, Kruttschnitt & Goldberg, for appellee.

LAND, J. "The plaintiff sues the defendant for the whole cost of the installation of an interlocking signal system constructed by the plaintiff on a public street in the city of New Orleans where the main lines of the two companies cross. The defendant admits liability for one-half of the cost of such installation. Judgment was rendered according to the contentions of the defendant, and

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the plaintiff appeals." The above is copied from the brief of the defendant as furnishing a clear and terse statement of the nature of the case under review.

The plaintiff company in 1867 and 1869 obtained from the city of New Orleans a license to lay and operate its tracks on a number of public streets of the municipality, including the intersection of Florida walk with Washington avenue. The plaintiff company has been operating a steam railroad on said streets and intersection for some 30 years.

In 1895 the New Orleans & Western Railroad Company, a steam railroad, obtained from the city of New Orleans a permit to lay and operate its tracks through the streets of said city, under the express proviso that nothing was given conflicting with previous grants.

The New Orleans & Western desired to cross the tracks of the Louisville & Nashville at Florida walk, and also to make two switches there connecting with its main line, and to that end entered on July 31, 1895, into a written contract with the Louisville & Nashville. Under the terms of this agreement, the right to cross and intersect was granted on the condition that the crossing and intersections were to be constructed and maintained without any expense, damage, or injury to the property of the Louisville & Nashville Railroad Company, and solely at the expense of the New Orleans & Western Railroad Company; and on the further condition that the grantee, its successors and assigns, should supply and maintain free of all expense to the grantor, its successors and assigns, all such signals and watchmen as may be deemed necessary by the grantor, to guard against accidents or damages of all kinds liable to occur at or near said crossings; and on the further condition that the grantee would, at its sole expense, and without any contribution from the grantor, comply with all laws or ordinances which might thereafter be adopted providing for gates, signals, watchmen, or any device of any kind at said crossings. The contract further provided that if the New Orleans & Western Railroad Company should fail or refuse, when called upon by the Louisville & Nashville Company, or when required by any law or ordinance, to furnish and maintain all such appliances, including automatic signals, interlocking and derailing switches and watchmen, as said Louisville & Nashville Railroad Company might from time to time deem necessary to properly guard said crossings, or should fail to comply with any of the requirements of the laws of the state or of ordinances of the city of New Orleans, then in such event the Louisville & Nashville Railroad Company might take up and remove such crossing or crossings as the New Orleans & Western Railroad Company, its successors or assigns might have put down or constructed, or might at its option furnish such appliances or comply with such laws or ordinances, and demand the cost thereof from the New

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Orleans & Western Railroad Company. This contract was never recorded.

The new Orleans & Western made the crossing provided for in the above contract, and complied with all of its obligations until April 8, 1901, when its property and rights were sold under a decree of the federal court to the New Orleans Belt & Terminal Company, whose officers were actually aware at the time of said purchase of the existence and terms of said contract.

In December, 1903, it became necessary, and was required by law for the plaintiff company, to construct an interlocking signal system at the crossing of the main lines of the two companies. The New Orleans Belt & Terminal Company, after due notice and demand made on December 3, 1903, refused to construct or pay for such appliances, and denied its obligation to do so.

On December 26, 1903, the New Orleans Belt & Terminal Company sold all of its property and franchises to the New Orleans Terminal Company, whose former name was the New Orleans & San Francisco Railroad Company.

After this purchase, the Louisville & Nashville Railroad Company made demand on the New Orleans Terminal Company to install an interlocking signal system at the crossing aforesaid. That company declined. The Louisville & Nashville Railroad Company then put in the system at a cost of \$6,220.24 and demanded payment of the whole sum. The terminal company offered to pay half the cost. This offer was declined, and the present suit was brought.

The defendant company since its purchase has been using said crossing and also the interlocking system installed by the plaintiff company. There is nothing to show that the officers or agents of the defendant company had any notice or knowledge of the contract sued on prior to the sale of December 26, 1903.

The demand of the plaintiff is bottomed on the theory that the defendant is bound by the contract of July 31, 1895. The petition alleges that the defendant and its predecessor were fully aware and had knowledge and notice, actual and implied, of the terms of said contract. In the alternative, the petition alleges that the continued use of said crossing by the defendant and its predecessor made it necessary for the plaintiff company to furnish and install said appliances, which otherwise would not have been required, and that the defendant has been benefited thereby to the full extent of the cost of the same.

As already stated, the contract in question was never recorded, and it is not shown that the defendant company ever had any knowledge of this contract when it bought the property and franchises of the New Orleans Belt & Terminal Company. The contract in question was relative to and affected immovable property, and created a real obligation and a real right. See *Railroad Company v. Railroad Company*, 44 La. Ann. 60, 10 South. 389.

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That a railroad track is real property is not disputed. All contracts affecting immovable property not duly recorded are null and void except between the parties thereto. Civ. Code, art. 2266. Hence the tracks of the New Orleans & Western Railroad Company, where they cross or connect with those of the plaintiff company, passed to the defendant free of the obligations imposed by the contract of July 31, 1895. Defendant is in the position of a railroad corporation which has already exercised the right to cross the tracks of another railroad corporation. The only contention left is the right of the plaintiff, as a matter of law, to impose on the defendant the entire cost of constructing and maintaining an interlocking signal system, which, according to the statement of facts, "was in fact necessary and required by law in order to properly guard the crossing aforesaid."

We learn from the argument of counsel that the "law" referred to is a rule adopted by the Railroad Commission of the state, which, we assume, throws no light on the question of cost now under consideration.

The Legislature has not deemed it necessary to define the rights and obligations of railroads, whose tracks intersect, connect, or cross. The Railroad Commission has not, so far as we are informed, made any rules on the subject. Under the ordinances of the city of New Orleans (in force in 1895), the expense of crossings is divided equally between the street railroads crossing each other, but the cost of maintenance is imposed entirely on a steam railroad crossing a street railroad. There is no special provision for maintenance where a steam railroad crosses a street railroad.

"Art. 1815. That in the future any new road (not now in existence) crossing any street or steam railroad, the said new road shall bear the entire expense of laying the same.

"Art. 1816. That the expense of maintenance shall be as herein provided." Flyunn's Digest, p. 706.

"Public things are those the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation." Civ. Code, art. 453.

"Things which are for the common use of a city or other place, as streets and public squares, are likewise public things." Civ. Code, art. 454.

Streets are common property, to the use of which all the inhabitants of a city or other place, and even strangers, are entitled in common. Civ. Code, art. 458. In this state, abutting proprietors are not recognized as having a fee in the sidewalks or streets in front of their estates. *Irwin v. Telephone Co.*, 37 La. Ann. 67. In *Brown & Co. v. Duplessis and City of New Orleans*, 14 La. Ann. 842, the power of that municipality to license the establishment of a railroad in the streets of the city, the cars to be drawn by horses and mules, was challenged. The Supreme Court af-

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firmed the power, as resulting from the following provision of Acts of 1865, p. 184, No. 131:

"No railroad, plank road nor canal, shall be constructed through the streets of any incorporated city or town, without the consent of the municipal council thereof."

In answer to the objection that the construction and operation of the proposed street railroad would deprive petitioners and others of "the free and unreserved use of open streets," and would create and maintain an obstruction in said streets, the court said:

"No citizen has a legal right to complain that the streets are used by other citizens, in a peculiar manner, even if it causes him a little inconvenience, as long as he is allowed the free use of the streets in his peculiar mode. The streets are destined for public use, but not for a particular mode of public use."

The court recognized the street railway as a new mode of conveyance not differing in principle from other modes of conveyance used by citizens, such as by omnibuses, carriages, carts, drays, etc.

The analogy between a street railroad and the ordinary modes of conveyance was the basis of the judgment rendered in that case, and the court compared the granting of the franchise for a street car railway to the "licensing of omnibuses or hacks for a specified period." The court recognized that no one can claim the exclusive use of the streets, and that every citizen has the right to use the streets in his own particular mode of conveyance.

A railroad in a street owns nothing but its tracks thereon and a right of passage over its own rails, subject to the right of the public or of other railroad properly authorized to use the street. The crossing of the plaintiff's track by the rails and cars of the defendant was not an appropriation of the property of the former to the use of the latter, but a mode of exercising the public right of transit over the street. *Brooklyn Central, etc., v. Brooklyn City R. Co.*, 33 Barb. (N. Y.) 420; *Elizabethtown Railroad v. Ashland*, 96 Ky. 347, 26 S. W. 181. The following extract from the case of *Central Passenger Railway Company v. Philadelphia Railway Company*, 95 Md. 428, 52 Atl. 752, is cited by plaintiff's counsel:

"The common-law doctrine that whatever structures are necessary for the crossing of an old way by a new must be erected and maintained at the expense of the party under whose authority and direction the crossing is made is applicable to railways and railroads which intersect each other upon the public streets of a city, unless that doctrine be modified by statute."

The case cited seems to be confined to structures necessary for the original crossing, and to assume that the prior establishment of the old way imposed on the new way the perpetual burden of maintaining the crossing as a whole. We do not think that

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this doctrine is applicable, under the provisions of the Civil Code, and the ordinance of the city of New Orleans, to railroad crossings in a public street. Under said ordinances, the new road must bear the entire expense of laying the crossing, but the expense of maintenance is equally divided in case of two street railroads, and is imposed entirely on a steam railroad when crossed by a street railroad. Under this legislation, the question of priority in time cuts no figure as to cost of maintenance of crossings, which is determined by the character of the two railroads. Reasoning for analogy, where two steam roads cross in a public street, the burden of maintenance should be equally divided between them. Where a crossing has been once established between two railroads, with equal rights to use the same public street, the maintenance of such crossing is in the interest of both railroads, and equity demands that the cost of the same should be equally divided between them. The argument to the contrary is based on the fallacious assumption that the plaintiff railroad is entitled to an "uncrossed track" in a public street by virtue of some superior right of privilege. The particular question before us has never been decided by this court.

In *Shreveport & Red River Valley R. Co. v. St. Louis & Southwestern R. Co.*, 51 La. Am. 814, 25 South. 424, the plaintiff sought to expropriate a strip of ground owned and possessed by the defendant company under a grant from the city of Shreveport.

In *Houston & S. R. Co v. Kansas City, S. & G. R. Co.*, 109 La. 582, 33 South. 609, the plaintiff sought to expropriate a crossing over the track and right of way owned by the defendant.

In *Kansas City, S. & G. R. Co. v. Louisiana Western R. Co.*, 116 La. 178, 40 South. 627, 5 L. R. A. (N. S.) 512, the plaintiff sought to expropriate switch crossings over the right of way of defendant, which did not extend beyond the ground covered by its tracks.

In none of the cases cited is there the remotest suggestion that the ground or the crossing used for it was a public street or place.

In the last-cited case, the plaintiff before the jury and the Supreme Court admitted its obligation to construct and maintain the crossings at its own expense.

In the case at bar the crossing was made by the New Orleans & Western Railroad Company long before the defendant company acquired the ownership of the property. In December, 1903, an order was issued by the Railroad Commission requiring railroads to install interlocking signal systems, which have nothing to do with the maintenance of the original crossing. This system was for the advantage of both roads, and we think that the burden of its cost and maintenance should be shared equally.

Judgment affirmed.

CLEVELAND, A. & C. RY. CO. *v.* SOUTH *et al.*

(Supreme Court of Ohio, March 3, 1908.)

[84 N. E. Rep. 418.]

Eminent Domain—Diversion of Stream—Time of Making.*—The power of a railroad company to appropriate private property for the purpose of diverting a stream from its natural location or bed, and acquiring land for the new channel made necessary by reason of such diversion, may be exercised at the time of the construction of the road, and for that purpose, but not afterwards in the making of improvements to the roadbed.

(Syllabus by the Court.)

Error to Circuit Court, Knox County.

Proceedings by the Cleveland, Akron & Columbus Railway Company to condemn certain property of South and others. Petition dismissed, and the company brings error. Affirmed.

The controversy out of which this error proceeding arises originated by a proceeding commenced in the probate court of Knox, by the Cleveland, Akron & Columbus Railway Company to appropriate lands owned by the defendants in error. Upon the preliminary hearing the court found all jurisdictional questions in favor of the plaintiff save as to the right to appropriate, and on that issue found as a fact that the land so sought to be appropriated "is intended to be used for the purpose of diverting a stream of water from its natural channel or bed, and for the purpose of making a new channel to convey the waters of the stream when so diverted or changed," and, as matter of law, held that the statute does not authorize a railway company whose road has been constructed across a stream and operated for a number of years, as is the case of plaintiff's road, to then divert the stream from its natural location or bed, and to appropriate land for the new channel made necessary by reason of such diversion of the stream. The petition was thereupon dismissed. Error being prosecuted to the common pleas by the plaintiff, the judgment of the probate court upon the controlling question was affirmed. This judgment of affirmance was affirmed by the circuit court, and the company brings error.

Waight & Moore, for plaintiff in error.*W. A. Hosack*, for defendants in error.

SPEAR, J. (after stating the facts as above). The power to

*For the authorities in this series on the question whether a single exercise of the power of eminent domain exhausts the right to condemn property, see last foot-note appended to *Cairo, etc., Ry. Co. v. Woodward* (Ill.), 27 R. R. R. 592, 50 Am. & Eng. R. Cas., N. S., 592.

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appropriate private property for general railroad purposes is given by section 3281 of the revised statutes, but whatever right a railroad company has to appropriate the property of others for the purpose of diverting a stream from its natural channel or bed is controlled by section 3284. Pertinent provisions of this section are: "A company may, whenever it is necessary in the construction of its road to cross a road or a stream of water, divert the same from its location or bed; but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness." The language of this statute is so plain as to hardly call for construction. By its terms the power to appropriate is limited to the necessity arising at the time of the construction of the road. And the rule which applies to the meaning of such a statute would seem to be as plain as any rule of law can be. It is that the grant being a part of the sovereignty of the state, is presumed to embrace in its terms all that it was intended to grant at all; so that, as held in *Minturn v. Larue*, 23 How. (U. S.) 435, 16 L. Ed. 574, "only such powers and rights can be exercised under them as are clearly comprehend within the words of the act or derived therefrom by necessary implication," doubtful claims as to power being always resolved against the corporation. This rule has been so repeatedly held and enforced by our courts that it seems needless to enlarge upon it, and a brief reference to some of the cases will suffice. Thus we find in *Moorhead v. L. M. R. Co.*, 17 Ohio, 340, that it is held that "private acts of incorporation, which confer power to subject private property to public use, should be strictly construed," and that the act of incorporation, which gave power to the company to appropriate land for the construction of its road, did "not confer upon the company a right to relocate their road after completing it upon the first location, and to condemn to the uses of the road private property." Birchard, C. J., in the opinion, observes this: "The corporators had the power to locate and construct a railroad. They could exercise this right but once without a further grant. To accomplish this object a most important attribute of sovereignty was bestowed upon them by the Legislature—the extraordinary reserved power of subjecting the property of private individuals to a public use. If it was intended that this should be a continuing power, one that might be exercised, and re-exercised again and again, as often as might suit the convenience of this company the Legislature should have so declared in express terms. They have not done so." The same principle was recognized and applied in *Currier v. M. & C. R. Co.*, 11 Ohio St. 228, the syllabus holding that "grants of corporate power, being in derogation of common right, are to be strictly construed, particularly where the power claimed is a delegation of the sovereign power of eminent domain." A like holding was had in *Atkinson v. M. & C. R. Co.*, 15 Ohio St. 21. The same rule of

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construction is reaffirmed in *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; also in *Platt v. Pa. Co.*, 43 Ohio St. 228, 1 N. E. 420. And, as applied to municipal corporations, the rule of strict construction is recognized and enforced in *Ravenna v. Pa. Co.*, 45 Ohio St. 118, 12 N. E. 445.

Perceiving no reason to change this rule established by our predecessors, and being of opinion that it has proper application to the facts of this case, we hold that, neither by the express terms of the statute, nor by necessary implication, is any authority given the company to make appropriation of private property for the purpose intended; the power given by the statute for that purpose having been exhausted by the exercise thereof in the construction of the road.

Attention is called to the case of *Lorain County v. L. S. & M. S. Ry. Co.*, 12 Ohio Ct. Dec. 805, as an authority in support of the contention of plaintiff in error. Without stopping to analyze that case we are not disposed to acquiesce in the reasoning and conclusion of the learned circuit court as applied to the facts of the case at bar. It is to be borne in mind that the provision respecting the diverting of streams from their location and bed is a special provision, separate and distinct from the provisions for the building of side tracks, depots, etc. The provision respecting the diverting of streams stands exactly as it stood when enacted in the general incorporation act of May 1, 1852, 50 Ohio Laws, p. 274. The case of *Moorhead v. L. M. R. Co.*, *supra*, had been the declared law of Ohio for a number of years when the act above referred to was enacted. The section has, in other respects, been a number of times amended by subsequent acts of the General Assembly; so that, the attention of that body having been thus called to the terms of the section, and presumably to the construction given language of similar import in previous enactments giving authority of a similar character, it is reasonable to presume that, had it been intended to confer the power to appropriate private property for the purpose indicated in section 3284, as a continuing power, one which might be exercised again and again as often as a railroad company might desire, the General Assembly would have so declared in express terms.

Judgment affirmed.

SHAUCK, C. J., and PRICE, CREW, and DAVIS, JJ., concur.

SELECTMEN OF AMESBURY *v.* CITIZENS' ELECTRIC ST. R. CO.

(Supreme Judicial Court of Massachusetts, Essex, June 15, 1908.)

[85 N. E. Rep. 419.]

Street Railroads—Compelling Operation—Statutes—Retroactive Effect.—St. 1906, p. 302, c. 339, now St. 1906, p. 614, c. 463, pt. 3, § 76, provides, if a street railway voluntarily discontinues the use of any part of its tracks for six months, the streets so occupied shall be cleared at the company's expense upon the order of the city, and if a street railway, without the right or lawful excuse, discontinues the use of any track and refuses to operate it when requested by the city, the mayor may petition the Supreme Judicial Court to compel the company to resume the use thereof, but nothing contained herein shall be deemed a legislative construction of existing law or the impairment of existing rights to discontinue such use. Defendant street railway abandoned operation of a part of its road in 1905, before the enactment of the statute. Held, that a petition could be maintained under the statute to compel the company to resume operation, even though the statute was enacted after it had abandoned the road, as the statute did not affect any rights of the railway, but simply provided a new remedy for an unlawful discontinuance, and applied to past as well as future discontinuances.

Street Railroads—Status—Duty to Operate.—Street railway companies are quasi public corporations organized for the exercise of an important public franchise, and bound to exercise the franchise for the benefit of the public, and not merely for their own profit.

Licenses—Nature—Right to Abandon.—As a bare license may, at any time, be revoked by the licensor, so the licensee may at any time wholly cease to avail himself of the permission given, and to discontinue his action thereunder, in the absence of an agreement to the contrary.

Street Railroads—Operation—Right to Discontinue—Statutes.*—St. 1899, p. 264, c. 304, authorized respondent street railway to purchase

*For the authorities in this series on the subject of the right of a railroad or street railway to discontinue operation, see note, 6 Am. & Eng. R. Cas., N. S., 667 (duty of street railway to construct and operate its road); *Brown v. Atlantic & B. Ry. Co.* (Ga.), 24 R. R. R. 255, 47 Am. & Eng. R. Cas., N. S., 255 (right to change location of route without legislative authority); *Georgia R. & B. Co. v. Haas* (Ga.), 23 R. R. R. 536, 46 Am. & Eng. R. Cas., N. S., 536 (railroad cannot dispose of its property or franchises, so as to relieve itself from liability, without legislative sanction); *Thompson v. Schenectady Ry. Co.* (C. C. A.), 13 R. R. R. 351, 36 Am. & Eng. R. Cas., N. S., 351 (consent of state necessary to validity of surrender of street railway franchises); *French v. Jones* (Mass.), 20 R. R. R. 817, 43 Am. & Eng. R. Cas., N. S., 817 (one who had purchased a street railway at

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the line it subsequently discontinued, and to complete the road and operate it, but did not compel it to do so. By St. 1864, p. 30, c. 53, incorporating respondent's predecessor, its right to lay its track upon the streets was subject to the determination of the mayor, etc., of the cities, and those officers could, after one year from beginning operation, revoke the location and require the tracks to be removed, and neither respondent's charter nor that of its predecessor required it to continue the operation of its road. St. 1864, p. 160, c. 229, § 19, provided that, if a street railway voluntarily discontinued the case of its tracks for six months, the tracks should upon the order of certain city officials be removed from the streets. After the enactment of the latter act, commissioners appointed under Resolves 1864, p. 333, c. 86, in their report advised that further provisions to allow city railways to discontinue the use of their tracks were unnecessary, nevertheless the provisions of section 19 were substantially re-enacted by St. 1871, p. 735, c. 381, § 25, Pub. St. 1882, c. 113, § 25, Rev. Laws, c. 112, § 36, and St. 1906, p. 614, c. 463, pt. 3, § 76. St. 1891, p. 794, c. 216, substantially re-enacted by St. 1906, p. 619, c. 463, pt. 3, § 97, provides that whenever, in the opinion of the railroad commissioners, additional accommodations are required upon any street railway, they may make an order requiring such accommodations after notice and hearing, and Pub. St. 1882, c. 112, §§ 14, 17, giving the board of railway commissioners general supervision over all railways, provides that upon complaint and application of the mayor, etc., of any city in which a railroad is situated, the board shall examine its condition, and 20 or more legal voters may request the mayor to make complaint, and on his refusal they may present their complaint to the board, which shall make such order as is necessary. Respondent street railway discontinued the use of the whole of a branch line, over which it had operated for some years and which was built by its predecessor, and suit was brought under St. 1906, p. 614, c. 463, pt. 3, § 76, to compel it to resume operations; but the board of railway commissioners had made no order to that effect. The discontinued line did not produce receipts sufficient to meet its running expenses. Held, that the course of legislation contemplated that a street railroad might discontinue operations, subject to certain control by the public of-

receiver's sale could not be compelled to use the tracks so purchased for the operation of a street railway); *State v. Duluth St. Ry. Co.* (Minn.), 5 R. R. R. 718, 28 Am. & Eng. R. Cas., N. S., 718 (duty to build line, construction of ordinances with respect to); *Jack v. Williams* (S. Car.), 3 R. R. R. 10, 26 Am. & Eng. R. Cas., N. S., 10 (operation of railroad at actual loss cannot be required); *State v. Spokane St. Ry. Co.* (Wash.), 11 Am. & Eng. R. Cas., N. S., 62 (mandamus will lie at instance of an abutting owner to compel a street railway to operate its line); *People v. St. Louis, etc., R. Co.* (Ill.), 12 Am. & Eng. R. Cas., N. S., 227 (mandamus to compel operation of railroad); *Sherwood v. Atlantic & D. R. Co.* (Va.), 6 Am. & Eng. R. Cas., N. S., 670 (duty of purchaser at foreclosure sale to operate branch line); *San Antonio St. R. Co. v. State* (Tex.), 6 Am. & Eng. R. Cas., N. S., 658 (Compelling construction of line).

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ficials, and the discontinuance was not "without right or lawful excuse," within the statute.

Railroads—Operation—Duty to Operate—Operation to Particular Point—Continuous Operation.*—If a charter of a railroad expressly requires it to operate its road as a continuous line, it may be compelled to do so, and if its charter requires it to construct its road and operate its cars to a certain point, which it has done, it may be compelled to continue to do so; but if the charter simply authorizes the corporation to construct its road to a certain point, without requiring it to do so, it cannot be compelled to complete or maintain its road to that point when it would not be remunerative to do so.

Case Reversed from Supreme Judicial Court, Essex County.

Petition by the selectmen of Amesbury against the Citizens' Electric Street Railway Company to compel respondent to resume the operation of a part of its railway. Case reserved for full court on exceptions by respondent to master's report. Petition dismissed.

Anthony W. Reddy, for selectmen of Amesbury.

Thomas H. Hoyt, for selectmen of Merrimac.

Guy W. Cox, for respondent.

SHELDON, J. This petition is brought under St. 1906, p. 302, c. 339, now St. 1906, p. 614, c. 463, pt. 3, § 76, to compel the respondent to resume the operation of a certain part of its railway, called the Pleasant Valley line. The defendant had abandoned and discontinued the operation of this line in January, 1905, and the first question is whether the petition can be maintained under a statute passed more than a year thereafter.

This statute in no way affected the rights of the parties; it expressly provided that nothing therein contained should be "deemed a legislative construction of any existing law or an impairment of any existing right of a street railway company to discontinue the use of tracks." It simply provided a new remedy for any unlawful discontinuance by giving a direct resort to the courts. It furnished a new remedy; but it impaired or affected no contractual obligations and disturbed no vested rights. As it was purely remedial in its character and did not change any existing rights, it naturally would be applicable to proceedings begun after its passage, though relating to acts done previously thereto. This is the doctrine which was declared in *Foster v. Essex Bank*, 16 Mass. 245, 273, 8 Am. Dec. 135. It has been applied in the construction of many similar statutes, so as to make a new remedy available for the protection of a prior right or for the redress of formerly existing grievances. *Bemis v. Clark*, 11 Pick. 452, 454; *Simmons v. Hanover*, 23 Pick. 188, 194; *Wood v. Westborough*, 140 Mass. 403, 409, 5 N. E. 613; *Rogers v. Nichols*, 186 Mass.

*See foot-note on page 382.

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440, 71 N. E. 590. It was the plain intention of the statute to provide a remedy for a case like this by giving redress for a wrongful discontinuance already existing, as well as for any that might occur in the future. It cannot be held that the words "if a street railway * * * discontinues the use of any track" apply merely to a future discontinuance. A somewhat similar contention was considered and rejected in *Commonwealth v. Dracut*, 8 Gray, 455, and *Brown v. Pendergast*, 7 Allen, 427. In the former case the court relied on "the long-established rule of construing statutes according to the manifest intent of the Legislature, though apt words to express that intent may not be used, or though such construction may not accord with the letter of the statute." And in the latter case the court said: "We apply an old and unshaken rule in the construction of statutes, to wit, that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general." The rule of cases like *Garfield v. Bemis*, 2 Allen, 445, where the giving of a new remedy would result in the revival of a former right which has absolutely lapsed, is not to be applied here. This petition can be maintained if the respondent's discontinuance of its Pleasant Valley line was without right.

When the respondent company purchased these lines of railway in 1899, it had under St. 1899, p. 264, c. 304, authority to complete the railway and its equipment, and to maintain and operate the same. But there was nothing compulsory in these provisions; and the respondent would not have lost its property rights in the rails and materials or in any other real or personal estate which it had acquired, if it had entirely failed to operate the railroad. *French v. Jones*, 191 Mass. 522, 78 N. E. 118, 7 L. R. A. (N. S.) 525. But it did assume control of all the routes which it had bought, including this Pleasant Valley line, and continued to operate them all until it discontinued the use of this line in January, 1905.

The respondent like all street railway companies, and like the lighting company spoken of in *Weld v. Gas & Electric Light Commissioners* (Mass.) 84 N. E. 101, is a quasi public corporation, organized for the exercise of an important public franchise, and bound to exercise that franchise for the benefit of the public and not merely for its own profit. Shaw, C. J., in *Commonwealth v. Temple*, 14 Gray, 69, 76. But it has not, like steam railroads, an exclusive control and a vested right of property in the soil upon which its tracks are laid. In the original charter given to this company's predecessor, the Newburyport & Amesbury Horse Railroad Company (St. 1864, p. 30, c. 53), its right to lay its tracks upon the public streets was made subject to the determination of the mayor and alderman or selectmen

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of the respective cities or towns, and those officers, after one year from the opening of its tracks for use, might at their pleasure revoke the location thereof, and the tracks thereupon must be taken up. Similar provisions were either contained in other street railway charters or were afterwards supplied by amendments thereto. Accordingly, this court said, in *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 517, 518, 28 Am. Rep. 264, that "the peculiar privilege given [to street railway companies] is the right, not to acquire land or an easement in land, but only the right, as long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel." So in *Springfield v. Springfield Street Railway*, 182 Mass. 41, 48, 64 N. E. 577, 580, it was said that grants to street railway companies of locations in the public ways are in the nature of a privilege or permit to use the public ways given by cities and towns by virtue of authority from the Legislature. And the court added: "They are analogous to licenses given to run omnibuses along certain routes, although of course to make the analogy complete the omnibuses would have to be built so as to run on rails laid in the streets. * * * They convey no exclusive rights in the highways or streets in which they are granted, but are to be used in common with others having occasion to use the public ways. The public authorities retain in the main full control over the streets or ways in which they exist, and may revoke the locations or alter or discontinue the ways without liability to damages therefor, and subject only to such limitations, if any, as the Legislature may see fit to impose." See, to the same effect, *Union Railway v. Mayor & Aldermen of Cambridge*, 11 Allen, 287. And as a bare license may at any time be revoked or terminated by the licensor, so the licensee is at liberty at any time to cease wholly to avail himself of the permission given and to discontinue his action thereunder, unless there has been some agreement to the contrary. This was the doctrine maintained in *Montana* and *Texas* in cases not unlike the one before us. *State v. Helena Light & Power Co.*, 22 Mont. 391, 56 Pac. 685, 44 L. R. A. 692; *San Antonio Railway v. State*, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834, reversing 10 Tex. Civ. App. 12, 30 S. W. 266, and 38 S. W. 54. To the same effect is *York & North Midland Railway v. Queen*, 1 El. & Bl. 858. But there is nothing either in the respondent's charter or in that of its predecessor, or in any other statute before 1891, or in the grant of any location, to the effect that the line in question shall be continued in operation. And the view that just as these locations might be revoked by the municipal authorities (*Medford & Charlestown Railroad v. Somerville*, 111 Mass. 232), so they might be abandoned or their use discontinued by the railway company, finds support in legislation. The first general street railway enactment was St. 1864, p. 155, c. 229; and section

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19 of this act provided that "if a street railway company voluntarily discontinues the use of any part of its tracks for a period of six months, the streets or highways occupied by the same shall upon the order of the board of aldermen of the city or the selectmen of the town forthwith, at the expense of the company, be cleared of said tracks, and put in as good condition for the public travel as they were in immediately before being so occupied." After the passage of this statute, the commissioners appointed under chapter 86, p. 333, of the Resolves of 1864, in their report to the Legislature of 1865 (House Docs. 1865, No. 15), called the attention of the Legislature to this subject by saying: "It does not seem to us that any further legislative provision in regard to allowing railway corporations to discontinue the use of their track in any street is demanded. As their rights in the streets are of the most precarious nature, we suppose it cannot fairly be claimed that the companies have incurred any duty or obligation to continue the transportation of passengers longer than it proves remunerative." The fact that after the Legislature had received this report the provisions of St. 1864, p. 160, c. 229, § 19, were substantially re-enacted in later codifications certainly tends to show that the Legislature considered that, subject to the provisions of their charters and other statutes, street railway companies might voluntarily discontinue in whole or in part the use of their tracks. See St. 1871, p. 735, c. 381, § 25; Pub. St. 1882, c. 113, § 25; Rev. Laws, c. 112, § 36; St. 1906, p. 614, c. 463, pt. 3, § 76.

Some limitations have indeed been put by later statutes upon the formerly unrestrained power of location by municipal officers, and the power of final action has been conferred upon other public officers. St. 1898, p. 745, c. 578, § 17; Rev. Laws, c. 112, § 32; St. 1906, p. 610, c. 463, pt. 3, § 66. But it still remains true that an ordinary street railway company holds its location upon the public ways without having any estate of its own in the lands.

But this right was of course subject to legislative control. *Brownell v. Old Colony R. R.*, 164 Mass. 29, 41 N. E. 107, 29 L. R. A. 169, 49 Am. St. Rep. 442. In 1891, it was enacted that: "Whenever in the opinion of the railroad commissioners additional accommodations for the traveling public are required upon any street railway, they may, after due notice to the street railway company and hearing thereon, make such order requiring additional accommodations to be provided as they think justice to all parties concerned requires, and they may alter, renew or revoke the same. * * * Any street railway corporation which neglects to comply with any such order for more than one week after it receives notice thereof in writing shall forfeit" a sum stated. St. 1891, p. 794, c. 216, re-enacted with slight verbal changes in St. 1906, p. 619, c. 463, pt. 3, § 97. After the en-

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actment of this statute and under the provisions of Pub. St. 1882, c. 112, §§ 14, 17, either the municipal officers or 20 or more legal voters of a city or town within which part of any street railway was located could, if the public accommodation so required, obtain an order from the board that the railway company should furnish such additional accommodations as were needed upon its railway, including of course any part thereof of which the company had chosen to discontinue the operation; for we cannot doubt that so long at least as the tracks remained in the street, they were still a part of the company's street railway. One effect accordingly of this statute was to make the company's discontinuance of the use of any portion of its tracks subject to the investigation and control of the board of railroad commissioners in the manner provided for; but otherwise the power of the company remained unaffected. In this case the board has made no order.

In passing upon this question we have not found much assistance from the decisions of the courts of other states, either as to railroad or street railway companies, which have been called to our attention by the industry of the petitioners' counsel. Many of them turned upon the mandatory language of the charters or other statutes or of the ordinances which were before the courts. *Union Pacific Railroad v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *State v. Hartford & New Haven R. R.*, 29 Conn. 538; *Mayor v. Dry Dock Ry.*, 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609; *Flint & Pere Marquette R. R. v. Rich*, 91 Mich. 293, 51 N. W. 1001; *Potwin Place v. Topeka Ry.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; *People v. St. Louis, Alton & Terre Haute R. R.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656. Undoubtedly a valid requirement in an order of location would be enforced. *Selectmen of Gardner v. Templeton Street Ry.*, 184 Mass. 294, 68 N. E. 340, but no such question is before us. Other cases relied on by the petitioners were decided upon the ground that the property of a railroad company is charged with the public duty and held subject to the trust to carry out the objects of its charter. *Gates v. Boston & New York Air Line R. R.*, 53 Conn. 333, 5 Atl. 695; *Pierce v. Emery*, 32 N. H. 484; *State v. Dodge City, Montezuma & Trinidad Ry.*, 53 Kan. 377, 36 Pac. 747, 42 Am. St. Rep. 295. Others were cases in which a company sought to retain a part of its franchise or of some particular location while abandoning the rest of it. *People v. Albany & Vermont R. R.*, 19 How. Prac. (N. Y.) 523, and 24 N. Y. 261, 82 Am. Dec. 295; *Bridgeton v. Bridgeton & Millville Traction Co.*, 62 N. J. Law, 592, 43 Atl. 715, 45 L. R. A. 837; *People v. Louisville & Nashville R. R.*, 120 Ill. 48, 10 N. E. 657; *State v. Spokane St. Ry.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739. But here the respondent has discontinued its use of the whole of the tracks covered by the locations under which they

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were built. And *State v. San Antonio Ry.* (Tex. Civ. App.) 38 S. W. 54; *Id.*, 10 Tex. Civ. App. 12, 30 S. W. 266, has, as we have already seen, been reversed in 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834.

We may add that it would be difficult, in the absence of statutory requirement, to reach the conclusion that a street railway company with so small a capital and resources so limited as those shown here should be required to operate a branch line which is not an integral part of its main system, and which has not sufficient patronage to meet its running expenses. If it were a steam railroad, it would not be required under the decision in *Com. v. Fitchburg R. R.*, 12 Gray, 180, to run passenger trains on such a branch; but in the case of a street railway, which does not carry freight, this means the complete disuse of its tracks. Substantially this rule was affirmed in *Sherwood v. Atlantic & Danville R. R.*, 94 Va. 291, 26 S. E. 943, and in *Jack v. Williams* (C. C.) 113 Fed. 823. See, also, *Ohio & Mississippi R. R. v. People*, 120 Ill. 200, 11 N. E. 347; *People v. Rome, Watertown & Ogdensburg R. R.*, 103 N. Y. 95, 8 N. E. 369. The general rule for such cases was stated by Gray, J., in *Northern Pacific R. R. v. Dustin*, 142 U. S. 492, 499, 12 Sup. Ct. 283, 285, 35 L. Ed. 1092: "If as in *Union Pacific R. R. v. Hall*, 91 U. S. 343, 23 L. Ed. 428, the charter of a railroad corporation expressly requires it to operate its railroad as a continuous line it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tidewater (as was held to be the case in *State v. Hartford & New Haven R. R.*, 29 Conn. 558), and it had so constructed its road and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a railroad corporation to build a bridge in compliance with an express requirement of its charter. *New Orleans, Mobile & Texas Ry. v. Mississippi*, 112 U. S. 12, 28 L. Ed. 619. But if the charter of a railroad corporation simply authorizes the corporation without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point when it would not be remunerative. *York & Midland Ry. v. Queen*, 1 El. & Bl. 858; *Great Western Ry. v. Queen*, 1 El. & Bl. 874; *Com. v. Fitchburg R. R.*, 12 Gray, 180; *State v. Southern Minnesota R. R.*, 18 Min. 40 (Gil. 21)."

We cannot say that the respondent's discontinuance of this line was "without right or lawful excuse" within the meaning of the statute; and it is not necessary to consider the exceptions taken by the respondent to the master's report. The petition must be dismissed.

So ordered.

COLUMBIA VALLEY R. CO. *v.* PORTLAND & S. RY. CO.

(Supreme Court of Washington, March 28, 1908.)

[94 Pac. Rep. 918.]

Injunction—Trespass to Real Property—Claim of Right—Evidence.—In an action by one railroad to enjoin another from constructing a roadbed over certain land, alleged to be a part of plaintiff's right of way, evidence examined, and held to justify a holding that defendant was the owner of the land in question, and that the appellant had no title thereto on which it could maintain injunction.

Same.—In such action it appeared that plaintiff purchased its right of way without regard to its surveyed line, but wholly by reference to its maps and field notes, and describing the land purchased by metes and bounds. Held that, in determining plaintiff's rights under its contract of purchase, it must be held to have purchased the land described, and not that actually surveyed.

Railroads—Right of Way—Use of Lands or Rights Acquired.—It is the general rule that when a railroad company in good faith surveys and locates a line of railway, and proceeds with reasonable diligence to procure a right of way thereover and to construct its road, the courts will protect its survey from the encroachments of another road.

♦ Appeal from Superior Court, Skamania County; W. W. McCredie, Judge.

Action by the Columbia Valley Railroad Company to enjoin the Portland & Seattle Railway Company from constructing its roadbed upon land alleged to be a part of plaintiff's right of way. From a judgment for defendant, plaintiff appeals. Affirmed.

W. W. Cotton, Covert & Stapleton, and Ralph E. Moody, for appellant.

James B. Kerr and George T. Reid, for respondent.

FULLERTON, J. The appellant and respondent are corporations, each having authority in virtue of its articles of incorporation to construct, maintain, and operate a railroad along the north bank of the Columbia river, where that river forms the southern boundary of this state. The appellant was incorporated in February, 1899, and the respondent in August, 1905. Immediately after its incorporation the respondent began actively the work of construction, and to that end entered upon certain lands in section 16, in township 1 N., of range 3 W., of the Willamette meridian, and began constructing a roadbed and boring a tunnel through a promontory thereon. The appellant thereupon began this action to enjoin the respondent from so doing, alleging that the lands entered upon formed a part of its own right of way, and that the respondent had entered thereon without right.

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The appellant bases its claim to the property upon both legal and equitable grounds. From the record it appears that during the summer of 1899 it caused a line to be surveyed along the proposed route of its road, and in December of that year adopted the surveyed line as the line of definite location of its road. This line as described and platted in the field notes and plats returned by its engineers reported the line as crossing the boundary between sections 10 and 15 in the township and range above named at a point 813 feet east of the corner to sections 9, 10, 15, and 16, from whence it proceeded in a southwesterly direction on stated courses and distances, crossing the line between sections 15 and 16 at a point 631 feet south of the corner named, from whence it proceeded through section 16 on like stated courses and distances. Section 16 was originally school land belonging to the state of Washington. In April, 1901, the appellant applied to the board of state land commissioners to purchase a right of way over the section under the act of March 18, 1901. Laws 1901, p. 353. To that end, it filed with its application, as required by the statute, a map showing the route of its proposed road, together with the field notes of its definite location, which map and notes described the route of the road in the same manner that it was described in the field notes of the survey originally returned by the engineers, and showed the lines to the section corner named as the same were thereon shown. The state had parted with its title to lot 4, in section 16, and the application to purchase was granted for all that part of the route lying west of lot 4. In making its application for a right of way to the state, however, the appellant did not file with the board of state land commissioners a copy of its articles of incorporation and due proofs of its organization thereunder, as required by the first section of the act of March 18, 1901, nor was the land sold pursuant to the law governing the public sale of state, school, and granted lands. The respondent located its road across the section in question in September, 1905, and in that month applied to purchase a right of way thereover under the act of March 18, 1901. Its map of definite location and the field notes by which it was accompanied showed that its line crossed the section line between sections 15 and 16 at a point 941.7 feet south of the corner to sections 9, 10, 15, and 16, and proceeded thence across the section on stated courses and distances that marked a line which lay wholly to the south of the appellant's survey and application. A certificate of purchase for a right of way over the tract was given it by the board of state land commissioners in the same month. Afterwards it brought condemnation proceedings and condemned a tract 75 feet in width on each side of the center line of its road as surveyed. To this action, however, the appellant was not made a party. After the respondent entered upon the ground, and began its work of construction, the appellant resurveyed its line, when it found that the line as

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actually marked on the ground did not correspond with the field notes and maps returned by its engineers, but lay some 300 feet to the south of the surveyed line, and almost entirely within the right of way conveyed to the respondent. There is some conflict in the evidence as to the condition of the markings on the ground at the time the respondent entered thereon. The appellant's engineers who retraced the surveys testified to finding a number of the station stakes with the station marks still upon them, and also that the transit hubs were in most instances still in place. One of the engineers testified, however, that some five or six lines had been run over the same ground, and that they had difficulty in distinguishing between the hubs of the appellant's line and those of the other surveys. The respondent, on the other hand, denies that any of its officers or engineers had actual knowledge that the survey of the appellant's line deviated from the maps and field notes it had adopted as the definite line of location of its proposed road and filed in the office of the board of state land commissioners; but it was made to appear that the contour of the ground for the greater distance across this section was such that the only practicable route for a road was at or near the line of the survey as actually made by the appellant, and over which the respondent was proceeding to construct its road. On the foregoing facts appearing, the trial court held that the respondent was the owner of the land in question, and that the appellant had no title thereto either legal or equitable on which it could maintain injunction. It seems to us that this conclusion is just. Whatever may have been the intent of the appellant, it is manifest that the state did not convey to it the property which it now claims. Conceding that it sufficiently complied with the statute in making its application, the tract applied for lies entirely to the north of the tract claimed, and, as this description is definite and certain, the legal effect of the conveyance is to convey the tract described and that tract only.

But the appellant insists that the line as actually surveyed and marked on the ground must be taken as the true line wherever there is a conflict between such line and the line as described in the field notes and plats, and, since the proofs were clear that the respondent entered upon its surveyed line, the trial court erred in failing to hold that there had been a trespass. It may be true that, had the appellant purchased its right of way with reference to its survey-line rather than with reference to its map and field notes—that is, had it described its right of way as so much land lying on each side of the line of its survey as marked and staked upon the ground, and taken a deed with such a description—it could properly contend that its true line was the line actually marked on the ground, even though its maps and field notes showed a different line. But it did not purchase with reference to such a description. It purchased with reference to its maps

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and field notes without regard to the surveyed line. In effect, it described the land purchased by metes and bounds; and in determining its rights under its contract of purchase it must be held to have purchased the land so described, not that actually surveyed. It has been held, it is true, and it is perhaps the general rule, that when a railroad company in good faith surveys and locates a line of railway, and proceeds with reasonable diligence to procure a right of way thereover and to construct its road, the courts will protect its survey from the encroachments of another road. But the rule can have no application here. In so far as it is made to appear by this record the appellant was not proceeding with the construction of its road, nor has it any intent or purpose to do so in the near future. Its survey over this line was made nearly seven years before the respondent's entry, the stakes marking the same were in part destroyed, and it was only by taking the field notes and following the line with care that these remaining stakes could be located. The appellant had, moreover, prepared and placed on the public records a map showing that its road did not trench on the ground here claimed, and we think it too much to say that the respondent, who is in good faith constructing a road, should be required to resort to condemnation proceedings and the payment of damages to the appellant before it will be permitted to continue its construction work.

The judgment is affirmed.

MOUNT, RUDKIN, and DUNBAR, JJ., concur.

HADLEY, C. J., and CROW, J., not sitting.

MARTIN v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina, May 29, 1908.)

[61 S. E. Rep. 625.]

Action—Consolidation.*—Plaintiff sued a railroad company for damages sustained by a collision between defendant's engine and a street car operated by an electric company, and also sued the electric company for damages sustained in the same collision, alleging in both actions that defendant failed to adopt a reasonably safe system for the operation of its cars at crossings with other railroads, and that by reason thereof the crossing was rendered extrahazardous, that defendant failed to have any agreement as to which cars on the different

*For the authorities in this series on the subject of the joinder of tort-feasors as defendants, see last foot-note appended to *Hollins v. New Orleans & N. W. R. Co.* (La.), 28 R. R. R. 283, 51 Am. & Eng. R. Cas., N. S., 283, where all those preceding it are collected; foot-note appended to *Hough v. Southern Ry. Co.* (N. Car.), 26 R. R. R. 759, 49 Am. & Eng. R. Cas., N. S., 759.

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tracks at the crossing should have precedence, and that defendant negligently failed to adopt a reasonably safe system as to the speed of its cars just prior to reaching the crossing, etc. Held, that the actions were properly consolidated, the duty to establish rules regarding the approaching of the crossing being joint, and the fact that one of defendants had not answered was immaterial, the order for consolidation being based on the allegations of the complaint.

Appeal from Superior Court, Mecklenburg County; Moore, Judge.

Actions by L. O. Martin against the Seaboard Air Line Railway Company and against another. From an order consolidating the actions, the railway company appeals. No error.

The plaintiff sued defendant company for damages sustained by a collision had between the engine of defendant and the car of the Charlotte Electric Railway & Power Company at a point in the city of Charlotte at the intersection of North Brevard street, alleging negligence in several respects. Plaintiff also sued the electric and power company for damages sustained at the same time, and in the same collision, alleging negligence on the part of said defendant in several respects. Among other grounds of liability, plaintiff urged in his complaint in both actions that it negligently failed to adopt, promulgate, and enforce a reasonably safe system and rules for the operation of its cars at crossings with other railroads, particularly the Seaboard Air Line Railway Company, and by reason thereof the said crossing was rendered extrahazardous; that the defendant failed to have any agreement with the Seaboard Air Line Railway Company as to their cars crossing the crossing when they arrived there at the same time or about the same time, and had no rule with each other as to which car or cars on the different tracks at the said crossing should have precedence; that the defendant negligently failed to adopt, promulgate, and enforce a reasonably safe system as to the speed of its cars just prior to reaching the said crossing, and negligently allowed and permitted and required its motormen to run its said cars at or about the said crossing in such a manner as to make it extrahazardous in the operation of the said cars thereat, varying the names of the defendant as applicable to each case. His honor, upon motion of plaintiff, ordered a consolidation of the cases. Defendant Seaboard Air Line Railway Company excepted and appealed.

J. D. Shaw and Stewart & McRae, for appellant.

Brewer Nixon, J. D. McCall, and J. F. Newell, for appellant.

CONNOR, J. While it must be conceded that a number of alleged negligent acts and omissions are alleged against each defendant, for which the other is in no wise responsible, the collision resulting in the injury that is the impact was caused by the engine

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and street car coming together at the crossing. The plaintiff alleges, among other omissions of duty, the failure of the two corporations to establish and maintain rules regulating their conduct in approaching the crossing. This duty, if any existed, was joint. One party could not establish joint rules without the assent of the other. If, as alleged, and for the purpose of this motion taken to be true, a joint duty was imposed upon defendants, and they failed to discharge such duty, they would each be guilty of negligence, and if such negligence was the proximate cause of the collision they would both be liable. If, on the contrary, there was a common breach of duty, and notwithstanding such breach of conduct either by positive action or omission to act at and before the collision, if one was the proximate cause of the injury, the other might be acquitted of liability. These, and many other questions discussed in briefs, are interesting and not easy of solution. We deem it unwise to discuss them at this time. They may or may not arise upon the verdict. It is always best to avoid discussing questions not presented by the verdict of the jury, found by a referee or admitted by demurrer. It is urged, and probably will be found true upon the trial, that it will be difficult to form issues or give instructions to the jury presenting clearly each and every phase of the litigation. This is one of the objections to the Code system of procedure, but it has many compensating advantages over the common-law systems, in which the jury could find only a general verdict. Issues may, by a judge with learning and experience, aided by counsel equally so, be so drawn that all controverted questions of fact will be presented and settled, enabling the court to declare the law and the relative rights and liabilities of the parties. We do not think that a demurrer could be sustained if the plaintiff had sued the defendants jointly. It is held that in an action for personal injuries the corporation may be joined with its employee. It may be, and frequently is the case, that the allegations include negligence of the former in regard to defects of the machinery, and of the latter in regard to the manner in which it is operated. In such cases the court submits issues directed to the several phases of the pleadings, and for greater certainty may, in its discretion, submit questions to the jury. Clark's Code, § 399; Quarles v. Jenkins, 98 N. C. 258, 3 S. E. 395.

Without intimating any opinion in regard to the merits of the controversy or the liability of either of the defendants, we are of the opinion that there is no error in the order of consolidation. The fact that one of the defendants had not answered is immaterial. The order is based upon the allegation in the complaint.

There is no error.

MORSE v. CHICAGO, B. & Q. RY. CO.

(Supreme Court of Nebraska, May 21, 1908.)

[116 N. W. Rep. 859.]

Limitation of Actions—Accrual of Cause of Action.—Where by the negligent construction of a railway embankment and ditches surface water is discharged upon the land of an adjoining proprietor and his crops thereby injured, such party's cause of action accrues at the date of the injury, and not at the date of the construction of the embankment and ditches.

Railroads—Lease—Duties of Lessee.*—Since the duty of maintaining a railroad in suitable and proper condition so as not to unnecessarily injure adjoining proprietors is a continuing one, it is assumed by the lessee of such railroad.

Evidence—Opinion Evidence—Negligence.—The question of negligence is for the jury, and it is not necessary to call expert witnesses to give an opinion upon the question whether a railroad was negligent in the manner of constructing and maintaining its roadbed.

Damages—Growing Crops—Elements.—Where the planting of land to a perennial crop like alfalfa increases the market value of such land, it is proper to show the damage done by the destruction of a stand thereof by proving the value of the land with and without such stand.

Same—Measure of Damages.—The measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction.

Trial—Instructions—Requests.—Instructions requested by defendant examined, and no error found in refusing the same.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Appeal from District Court, Franklin County; Adams, Judge.

Action by William W. Morse against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

W. S. Morlan, F. A. Bishop, Fred M. Deweese, and Byron Clark, for appellant.

W. H. Miller and George W. Prather, for appellee.

CALKINS, C. The railroad hereinafter mentioned was built by the Republican Valley Railroad Company in 1880, sold to the Chicago, Burlington & Quincy Railroad Company in 1884, and

*See foot-note appended to *Hawkins v. Central of Georgia R. Co.* (Ga.), 11 R. R. R. 831, 34 Am. & Eng. R. Cas., N. S., 831, where all the preceding authorities on the subject in this series, preceding it, are collected or referred to; second foot-note appended to *Hollins v. New Orleans & N. W. R. Co.* (La.), 28 R. R. R. 283, 51 Am. & Eng. R. Cas., N. S., 283.

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leased to the defendant in 1901. Near Bloomington in Franklin county the road was constructed east and west at the foot of the bluff and in the valley on the north side of the Republican river. At and near the Bloomington station the railroad crossed a "draw" running in a southerly direction, and its embankment intercepted the natural course of flow of water collected by such draw in times of rainfall. A ditch had been constructed for a short distance west on the north side of the railroad, where a culvert was provided, through which the water flowing down said draw and through said ditch was discharged upon a tract of level land lying south of the railroad tracks. Some time in 1894 the plaintiff became the owner of this tract of land, and in 1903 the water discharged through the culvert in question flooded the plaintiff's land and destroyed about 30 acres of alfalfa and the same number of acres planted to corn. In 1904 this land was again flooded in the same manner, damaging or destroying 15 acres of cane and 35 acres of corn. This action was brought by the plaintiff to recover such damage, on the ground that the same was caused by the negligent construction and operation of said railroad. There was a trial to a jury, and from a verdict rendered for the plaintiff upon a judgment therein the defendant appeals.

1. The first point made by defendant is that the plaintiff's petition does not state facts sufficient to constitute a cause of action; and the second is that the action is barred by the statute of limitations. As these two points are supported by the same arguments, they will be considered together. The defendant argues that the ditch and embankment complained of were permanent, and that the injury done to plaintiff was a natural result of the proper construction of a railroad, and was included in the damages done to the land owned by plaintiff at the time the right of way was taken. It is contended that the plaintiff should have anticipated all the injury that might accrue to his land by reason of any defective construction of defendant's road, and should have brought this action within the statutory period from the date of the completion of the road, and that, since it appears upon the face of the petition that more than 10 years have elapsed since said construction, there can be no recovery. This is not the law. A man is not required to anticipate an injury from the probable negligence of some one else. The statute of limitations does not run until the injury has been actually received. *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578; *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540, 69 Am. St. Rep. 602; *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 656, 87 N. W. 167; *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610, 88 N. W. 673; *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144; *Chicago, R. I. & P. R. Co. v. Ely* (Neb.) 110 N. W. 539.

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2. The determination of the foregoing questions logically disposes of the defendant's plea that because it is the lessee it is not liable for damages resulting from the negligent construction of the ditch and embankment by the original owner. The duty of maintaining a railroad in suitable and proper condition so as to not unnecessarily injure adjoining proprietors is a continuing one, and is by no means ended with the first construction of the road. Ditches have a tendency to fill, embankments wear away, surrounding conditions change; and experience often demonstrates defects in the original design. The duty to meet these changing conditions with reasonable care and prudence is a continuous and never-ending one. From its very nature this duty could not have been fulfilled by the original owner in advance for the period of the term of the lease or for any other period. It was a duty which could only be discharged from day to day and from time to time in the maintenance and operation of the road, and was therefore a duty which could only be performed by the lessee, who was the owner for the time being. We do not decide whether the lessor might be jointly held with the lessee; but we are satisfied that the latter is liable to the same extent as the former would have been had it continued in possession.

3. The defendant contends that the verdict is not supported by sufficient evidence, in that there is no showing whatever as to its unnecessarily or negligently injuring the plaintiff. If it is meant by this that no expert witness was called to pass judgment upon the method used by defendant in maintaining its roadbed at this point, the answer must be that such testimony was not necessary. The evidence sufficiently shows what was done, and what the result was; and it was a question for the jury whether the defendant was chargeable with negligence. *Fremont, E. & M. V. R. Co. v. Harlin, supra.*

4. The plaintiff offered evidence tending to prove that the overflow of water complained of killed a stand of alfalfa on about 30 acres of land in 1903; and he offered and was permitted to introduce testimony showing what the land was worth with the alfalfa growing upon it, and what it was worth without the alfalfa. In this we discover no error. It is well known that seeding to alfalfa is a hazardous process, the result of which cannot be accurately predicted, and failures often result from conditions altogether beyond the control of the husbandman. Under these circumstances the difference in value between land having a successful stand of alfalfa and land without the same would be a safer measure of the value of such stand than would the cost of again seeding to alfalfa.

5. It is claimed by the plaintiff that 30 acres of corn were destroyed in 1903, and 15 acres of cane and 35 acres of corn in 1904. The evidence as to the time of the destruction of these

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crops is very indefinite. In one place it is said that the first cutting of alfalfa was destroyed, and in another that the corn, was as high as the head of the attorney for the plaintiff; and we may therefore reasonably presume that it was some time in midsummer. The only evidence offered by the plaintiff as to the crops of 1904 was concerning their value in the fall. The general rule is that the value of a growing crop in the condition in which it exists at the time of its destruction is the measure of damages. *Fremont, E. & M. V. R. Co. v. Harlin, supra*; *Berard v. Atchison & N. R. Co. (Neb.) 113 N. W. 537*, *Chicago, B. & Q. R. Co. v. Emmert, supra*. No evidence was offered of the necessary expense of cultivating, harvesting, and marketing the crop; and the estimate eliminated the chance of hail, windstorms, early frosts and other hazards to which a crop is exposed between midsummer and autumn. The amount of the verdict, \$1,500, does not indicate that the jury made any substantial deductions upon its own motion, and we think the error was material.

6. The remaining errors assigned by the defendant relate to the giving and refusal of instructions. Instructions No. 2., given by the court on its own motion, is criticised on the ground that it submitted to the jury the question of the negligent construction of the roadbed and use and operation thereof when no such issue was made. Such an inaccuracy will probably not occur upon a second trial, and, as the case must be reversed for the reasons hereinbefore stated, it is not necessary to determine whether this instruction was prejudicially erroneous. Instruction No. 7, requested by the defendant, was prepared to present its view of the statute of limitations, which we have already considered, and it was properly refused. Instruction No. 5, requested by the defendant, was properly refused for the reason that the court had already instructed the jury that the burden of proof was upon the plaintiff to prove the negligence charged. Instruction No. 6 was incomplete in that it omitted the element of the defendant's duty to avoid the infliction of unnecessary damage upon the adjoining property owners.

We discover no error except that committed in the admission of the evidence relating to the measure of damages, and for that error we recommend that this cause be reversed and remanded for further proceedings according to law.

FAWCETT and ROOT, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for a new trial.

ANDEL et al. v. DUQUESNE ST. RY. CO.

(Supreme Court of Pennsylvania, Jan. 6, 1908.)

[69 Atl. Rep. 278.]

● **Street Railroads—Use of Streets—Who May Question.**—Citizens having no right to the use of streets covered by branches of a street railway company cannot obtain injunction restraining the company from asserting its rights to such use and occupation.

Quo Warranto—Street Railroads—Who May Question.—The only manner of questioning the validity of extension of a street railway secured as provided by statute is quo warranto sued out by the state at the suggestion of the Attorney General.

Street Railroads—Use of Streets—Who May Question.—Where Individuals have filed articles of association with the Secretary of the Commonwealth in order to procure a charter as a street railway company, they have no standing before letters patent have been issued to file a bill under Act June 19, 1871 (P. L. 1360), to question the right of a street railway to maintain extensions secured as provided by statute.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Coleman E. Andel and others against the Duquesne Street Railway Company. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Arthur O. Fording, Johns McCleave, and Warner Marshall, for appellants.

Rccd, Smith, Shaw & Beal, for appellee.

ELKIN, J. The respondents demurred to the bill on two grounds, first, that the complainants have no right, individually or otherwise, to maintain the bill; and, second, the court has no jurisdiction to grant the relief prayed for. Either ground would be a sufficient answer to the contention of appellants, and both are good under the facts of this case. The first, second, and third prayers ask for an injunction, and the fourth for a decree annulling the extensions and vacating the record made by recording the certificate in accordance with the provisions of law in the office for recording deeds in the county of Allegheny. It is an elementary principle that he who seeks equitable relief must establish a clear legal right to the enjoyment of that, the injury to which he seeks to enjoin. This burden always rests on the complaining party. Equity will not enjoin at the instance of one who has no legal right to the use, occupation, or enjoyment of the property or

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thing about to be invaded. A complainant must stand on the strength of his own rights rather than on the weakness of those claimed by a respondent. These familiar principles of equity practice furnish a complete answer to the first three prayers of the bill in the present case. The complainants have no right, legal or otherwise, to the use and occupation of the streets and highways covered by the branches or extensions of the respondent, and therefore have no standing to ask a court of equity to enjoin it from asserting its right to such use and occupation. Indeed it has been held that, even where a street railway company has obtained a charter to construct its lines on certain streets, but failed to secure a municipal grant to use the same, it had no standing in equity to enjoin another company having secured, not only a franchise from the state, but authority to use the streets from the municipality. *Larimer & L. Street Railway Co. v. Larimer Street Railway Co.*, 137 Pa. 533, 20 Atl. 570. The fourth prayer raises the question of the validity of the extensions and branches which were secured in the manner provided by statute, and it is perfectly clear complainants have no standing to ask a court of equity to make such a decree. The validity of a charter, the forfeiture of charter rights, which includes branches and extensions, can only be inquired into or declared on a writ of quo warranto sued out by the state at the suggestion of the Attorney General. *Western Pennsylvania Railroad Company's Appeal*, 104 Pa. 399; *Windsor Glass Co. v. Carnegie Co.*, 204 Pa. 459, 54 Atl. 329; *Thirteenth and Fifteenth Streets Railway Co. v. Broad Street Rapid Transit Street Railway Co.*, 219 Pa. 10, 67 Atl. 901.

Is there jurisdiction in equity to grant the relief prayed for in the bill? The answer must be in the negative. The averments of the bill are not sufficient to bring this proceeding within the purview of the act of 1871 (P. L. 1360). On June 1, 1906, the appellants filed in the office of the Secretary of the Commonwealth articles of association for the incorporation of the Kelly Street Railway Company and the Hay Street Railway Company. Notice by publication, as required by statute, was given to the effect that the subscribers would apply to the Governor on June 26, 1906, for a charter. On June 20, 1906, the stockholders of the respondent company met pursuant to a call for that purpose, and under the provisions of law voted to extend its route by branches and extensions over part of the streets covered by the application of appellants. The resolutions authorizing the extensions and branches were filed in the office of the Secretary of the Commonwealth on June 21, 1906. Some weeks later they were presented to the Governor for his approval, and on October 31, 1906, were approved by him. At a later date the Secretary of the Commonwealth issued a certificate of approval which was recorded in the proper office of Allegheny county on

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November 13, 1906. Prior to the approval of the extensions and branches the appellants, through counsel, appeared as protestants against their approval, and were fully heard either by the Governor, acting in his official capacity, or by those who represented him. There were thus presented to the Governor for his consideration and approval the articles of association entered into by appellants asking for a charter and a record of the proceedings by which the respondent company extended its route by branches and extensions. The parties were claiming conflicting rights and franchises. The Governor approved the branches and extensions as having the prior right to the use of the streets, and refused to issue letters patent to the complainants.

It is argued that appellants under the articles of association filed in the office of the Secretary of the Commonwealth had an inchoate right to construct and operate a street railway over its proposed route, and that this is such a right as should be protected by a court of equity. No authority is cited in support of this proposition, and none can be. Such a doctrine has the novelty of being original in a court of equity. Inchoate rights, if such there can be under an application for a charter never obtained; franchises, never secured, or, if secured, forfeited or abandoned; municipal grants, never made, or, if made, conditions precedent not performed—do not meet the burden resting on a complainant which requires that he first established a clear legal right. When persons enter into articles of association for the formation of a company to operate a street railway, their agreement is between themselves, and the commonwealth is not a party to it. There is no privity of contract between the state and the proposed incorporators until letters patent are issued. The filing of the articles of association in the office of the Secretary of the Commonwealth is a preliminary step in securing a charter, but the powers, privileges, and franchises sought to be obtained are not conferred until letters patent are secured. In the present case it should be observed that all parties acted within their legal rights. The respondent company only did what the law authorized it to do. If, in securing the extensions and branches, the requirements of the statute put it in a position whereby these franchises could be secured at an earlier date than those which the complainants sought to obtain, the fault, if such it be, is in the law, and not in those who administer it. The complainants are not a corporation, and do not enjoy any corporate franchises. How, then, can it be said that they are entitled to equitable relief under the act of 1871? The private rights of individuals referred to in this act are rights of property of some character. The complainants do not allege that any property right vested in them, individually or collectively, has been or is about to be, invaded. They do not possess any rights or franchises as a corporation

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and as such cannot be said to suffer any injury within the meaning of the law. It is clear, therefore, that they are not entitled to the relief provided in this act. The learned court below in a well-considered opinion has carefully discussed and decided the case upon its merits, and we fully concur in his conclusion.

Decree affirmed at cost of appellants.

KING v. RALEIGH & P. S. R. Co.

(Supreme Court of North Carolina, April, 1, 1908.)

[60 S. E. Rep. 1133.]

Contracts—Enforceability—Immoral Consideration.—The courts will not enforce a contract based on an immoral consideration.

Same.—Contracts for money for personal profit to use efforts and influence to carry an election, especially an election to vote bonds for the use of a railroad, are contrary to public policy, and are not enforceable.

Same.—A contract by a newspaper editor for the sale of his editorial influence to aid a railroad to carry elections for the issuance of bonds by municipalities in aid of the railroad, and for other services in carrying such elections, is contrary to public policy, and is not enforceable.

Appeal from Superior Court, Pitt County; Lyon, Judge.

Action by Henry T. King against the Raleigh & Pamlico Sound Railroad Company. From a judgment for plaintiff, defendant appeals. Action dismissed.

Moore & Long, for appellant.

J. L. Fleming, for appellee.

CLARK, C. J. The complaint alleges that the plaintiff was editor of a newspaper, and "(2) that during February, 1902, the defendant company, then trying to secure aid in building a line of railroad from Raleigh to some point on Pamlico Sound, applied to the plaintiff to secure the columns of his paper, and his personal service, in trying to carry elections along the route of the proposed road by which bonds were to be issued for the use and benefit of said road, and gain for said road the good will of the citizens along said road, and in other ways assist the managers and directors of said road in their undertaking, and under the promise from the manager and one of the directors of said defendant company that he should be 'taken care of,' well paid for his services, he agreed to serve the defendants as best he could in the manner suggested, and did serve them in

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the ways indicated by defendants through the columns of his paper, by advertisements and by personal services at elections, and in other ways well known to defendants. For such services the defendants agreed and promised to pay, but when demand was made the said company admitted his right to compensation, but only offered him \$300 in second mortgage bonds of said railroad company for his services. (3) That the services rendered the defendants by the plaintiff were reasonably worth the sum of \$1,500. (4) That payment has been demanded and refused."

The plaintiff makes clear his meaning by his evidence, in which he said: "I was to do everything I could through my paper and by personal service in the interest of the railroad. * * * I published editorials, etc., in the paper for two years. * * * I don't know that I published articles favoring railroad in every issue. They were to pay me for editorials." He further testified that he had a great many conversations with the president and general manager of the defendant railroad company, "in all of which he agreed to pay for my services. I ran a paper. That was my regular work. * * * Another service I rendered was in arranging for and helping to carry the elections for issuing bonds for the railroad in 1903. Contract was, 'if it won, would issue \$15,000 bonds and take second mortgage,' etc. I was largely instrumental in getting citizens interested, and in calling elections, and in getting people to register and vote, and in carrying the elections. Don't know that others got anything for services. * * * Munford (an advertiser) has paid me as much as \$400. I gave him more space than I did the railroad; but, if I had advocated his business like I did for the railroad, it would have been worth several thousand to his business. I never published notices for railroad. County and town paid me for elections notices. I wrote the editorials published in my paper myself, and would copy extracts from other papers." On redirect examination he admitted that "there is a difference in advertising a thing and advocating a measure." The court concurs in this last proposition.

When an advertisement is inserted, the public knows that it is paid for, and that it speaks for the advertiser; that the representations are made by him, and not by the editor. But an editorial is understood to express the true and unbought views of the editor. It is because of that fact that they carry any weight with the public. It was precisely because of such weight that the defendant thought it worth money to buy the use of plaintiff's editorial columns. Had the plaintiff informed the public that he had sold his editorial columns to the railroad company, his editorials would have had no weight whatever in inducing the citizens to vote a bond issue on themselves in favor of the railroad. Both parties knew this. Both are at fault. Public policy will not per-

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mit the courts to enforce a contract based upon an immoral consideration, but will leave the parties to their own devices. *Basket v. Moss*, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; *Burbage v. Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409, and many other cases cited; *McNeill v. Railroad Co.*, 135 N. C., at pages 733, 734, 47 S. E., at page 783, 67 L. R. A. 227. The sale of editorial columns and services for carrying an election are neither recognizable in a court of justice as ground of action for a recovery of compensation.

Contracts for money or personal profit to use efforts and influence to "carry an election," especially an election of this character, are contra bonos mores. 9 Cyc. 500; *Wilcox v. Puryear*, 12 Ky. Law Rep. 556; 15 A. & E. 984; *Dean v. Clark*, 80 Hun, 80, 30 N. Y. Supp. 1130. In *Trist v. Child*, 88 U. S. 449, 22 L. Ed. 623, there is citation of numerous authorities which have refused to uphold contracts alleged in the complaint, because they are held to be against the policy of the law and the theory upon which the government of this republic is founded.

The plaintiff in this case was the editor of a paper, and is seeking to recover for sale of his editorial influence and for other alleged services in carrying an election to issue bonds. Certainly this was as much against public policy as an agreement for a consideration not to bid on articles to be sold by the government, or an agreement to pay for a contract to carry the mail, or an agreement to pay for procuring signatures to a pardon to be presented to the Governor, or an agreement not to bid at a sale made under the judicial order, or an agreement to pay for promoting a marriage, because in each of the several instances mentioned, which have all been held to be invalid by reason of public policy, the interests effected are private, and largely bear upon individuals, rather than a community, while in this case the interests affected are public, and bear, if the burden should be placed, upon the whole community.

There are other services mentioned in the complaint; but they are all stated in the same cause of action, and so mixed up with it as to poison the whole. *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. Ed. 623. It is probable that the whole employment was based upon the influence of the newspaper and its editorials. Certainly the defendant's demurrer ore tenus to the action should have been sustained below, and must be sustained there.

Action dismissed.

HANNUM *v.* MEDIA, M., A. & C. ELECTRIC RY. CO. *et al.*

(Supreme Court of Pennsylvania, May 25, 1908.)

[70 Atl. Rep. 847.]

Appeal and Error—Reversal—Demand—Proceedings Below.—A decree dismissing a bill in equity was reversed by the Supreme Court, with directions that the bill be reinstated and an injunction awarded, with leave to defendant to move to open the case for further testimony. Held that, on restoring the case in accordance with the judgment of the Supreme Court, the court below could proceed to take additional testimony and again dismiss the bill.

Street Railroads—Use of Street—Rights of Abutting Owners.—Where a street railway company used a street already occupied by an existing railway, and did not intend to construct a branch of its own on the street, an abutting property owner had no ground to complain.

Same—Rights under Charter.*—Where a street railway under its charter has a right to build branches and extensions, it has the right to use the tracks of another company for a short distance under a contract with such company to connect its main line and the proposed extension.

Appeal from Court of Common Pleas, Delaware County.

Bill by John B. Hannum against the Media, Middletown, Aston & Chester Electric Railway Company and the Philadelphia, Morton & Swarthmore Street Railway Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

O. B. Dickinson, for appellant.

E. A. Howell, *Ellis Ames Ballard*, and *David Wallerstien*, for appellees.

STEWART, J. In compacting the 91 assignments of error which here confront us into five questions, and very clearly and concisely stating these, the learned counsel who argued the case for appellant has saved us both time and labor which otherwise would have been unprofitably expended. We shall confine ourselves to these questions, observing the order in which they have been presented. A brief statement of facts, however, is necessary to a proper understanding of their significance. The charter route of defendant's railway extended from a point at Elwyn Station, on

*See note, 4 Am. & Eng. R. Cas., N. S., 411, et seq.; Toledo Consol. Ry. Co. *v.* Toledo Elec. St. Ry. Co. (Ohio), 1 Am. & Eng. R. Cas., N. S., 230; Port Richmond, etc., R. Co. *v.* Staten Island R. T. Co. (N. Y.), 1 Am. & Eng. R. Cas., N. S., 229; Colonial City Traction Co. *v.* Kingston City R. Co. (N. Y.), 9 Am. & Eng. R. Cas., N. S., 506.

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the Philadelphia, Wilmington & Baltimore Railroad, through the township of Middletown and Chester, to a point on the northern boundary of the city of Chester. By appropriate action taken by the stockholders and directors, and with the consent of the municipalities through which the route passed, so much of the route as led to Elwyn, from a point a short distance south of that station, was abandoned, and from that point a line leading to the borough of Media was adopted. The defendant company thereafter adopted certain extensions from its southern terminus upon and over certain of the public streets in the city of Chester; the design being to establish a connected and continuous system of street railways in said city, in conjunction with defendant's main line to Media borough. Connection between these several extensions and the main line could be made, however, only by the use of a street in the city known as "Edgmont Avenue," a necessary part of which was already occupied by the tracks of another railway. Resolutions providing for one of the extensions adopted the avenue as part of the route, notwithstanding its previous occupancy by another railway. Municipal consent was given to the extension determined upon. Two of these proposed extensions were along certain streets on which the plaintiff owned property, but the occupancy contemplated was on the farther side. The bill filed in the case set forth the company's charter and the several extensions determined upon, and, averring that irreparable injury would result to plaintiff's property from the construction of the extensions, challenged the franchise of the defendant company in this connection on several grounds, and prayed that its right to build the proposed extensions might be judicially inquired into. A preliminary injunction to preserve the status quo until final determination of the case was granted. Upon hearing the bill was dismissed. An appeal followed, which resulted in a reversal of the decree. *Hannum v. Media, etc., Electric Railway Co.*, 200 Pa. 44, 49 Atl. 789.

1. In reversing the decree this court directed that the plaintiff's bill be reinstated, and an injunction awarded, with leave to the defendant to move the court below to open the case for further testimony. The decree was reversed because the defendant had not met the burden of proof that was upon it with respect to certain facts alleged in plaintiff's bill, which if true, operated in law to defeat its claim of right to construct the proposed extensions. In allowing the case to be opened on defendant's motion, the purpose was to afford the defendant an opportunity to supplement its proofs, and establish, if it could, its right to do what it proposed. The injunction, though awarded by this court, was issued from the court below. In awarding it, the purpose was to restore the case to exactly the standing it had before the decree dismissing the bill had been entered. The additional testimony to be taken under the order allowing the case to be opened was for the con-

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sideration of the court below, and for this court, only as error was assigned to the findings and conclusions of the court below with respect to it, on appeal. In a word, the case was remitted to be proceeded with on defendant's motion just as though it had not been adjudicated. The objection that in entering the decree, from which the present appeal is taken, dismissing the plaintiff's bill, the court exceeded the authority given it under the decree of this court, has nothing to support it. The court below correctly interpreted the order made, and the case was proceeded with in exact compliance with the order. There can be no occasion for misunderstanding with respect to the costs. In reversing the former decree the order of this court was that "all costs up to the present time be paid by the defendant." We pass to the second question, which is:

2. May a railroad be lawfully constructed as a branch, when the branch is proposed to be laid along a street which for more than 2,500 feet is already occupied by an existing railway? The reference here is to the occupancy by the defendant company of part of Edgmont avenue on which the Chester Traction Company had a line of street railway. From an examination of the map furnished us, it clearly appears that the 4,000 feet on Edgmont avenue over which defendant's extension was projected, and upon which are the tracks of another company, is the nexus which links all the extensions of the defendant's road in the city of Chester with the defendant's chartered route. A break at that point, which must result if appellant's contention be sustained, would be a fatal severance to the branch lines, since it would leave them wholly disconnected from the chartered route, and, therefore, without legal existence. In view of the large expenditure of money made in the construction of the several extensions (they have been constructed and are now being operated), and in view of the fact that they compose so large a part of defendant's system, such a result would be little less than disastrous to the company. That is a circumstance, however, not to be considered in the determination of the present controversy, except as the general equities in the case, if there be any, make a consideration of it proper. The particular question here propounded has no application to the facts of this case. The defendant company never proposed, and, so far as we can see, never contemplated, the construction of a branch of its own on that part of Edgmont avenue which was occupied by the existing railway. Its purpose from the beginning was to subject in some way to its use so much of the line of track owned by the other company on Edgmont avenue as was necessary to link the connecting branches with the trunk road. The resolutions ordering the extensions expressly so provide. Had these resolutions been part of the original charter route, such a provision appearing in the application for the charter would have either operated to defeat the application or have rendered nugatory any

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charter that might have been granted thereon, for the reason that the act of assembly under which the company was chartered—Act May 14, 1889 (P. L. 211, § 1)—authorizes only the incorporation of street railway companies for constructing, maintaining, and operating street railways on streets or highways upon which no track is laid or authorized to be laid. But here we have no question as to the existence or validity of the defendant's charter. Even though the company's right to maintain the extensions were to be denied, the company's lawful existence and the right to maintain its trunk lines would not be affected thereby. This feature of the case, though without significance in this connection, may call for further consideration when we come to the discussion of the next question submitted.

3. Can a street railway company make use of the tracks of another railway to connect its chartered route with the branch otherwise disconnected? We adopt this form of the question, because more concise than that formed by appellant's counsel. It eliminates some matters which may be regarded as superfluous. The question raised does not assail the integrity of the defendant's charter. It simply challenges the right of the company to do the thing complained of under an unimpeached charter. The charter gave the company the right to make such extensions or branches as it might deem necessary to increase its business and accommodate the travel of the public. The questions submitted conceded that the company has in all respects complied with the provisions of the act of assembly relating to extensions or branches, except in the fact complained of, the adoption of another company's line, to connect its main line with its extensions. Does the limitation imposed in connection with the charter of street railway companies—that is to say, the provision which limits their right to streets on which no track has been laid or authorized—apply as well to extensions and branches? We can see nothing in the language of the act, nor yet in the general purpose to be accomplished thereunder, that would warrant an affirmative answer to this question. The limitation in express terms is upon the right to obtain a charter. We would naturally look for any limitation upon the right of a company legally chartered to do those things which such companies are expressly authorized to do as they may deem necessary to increase its business and accommodate public travel to be none the less explicit. The section of the act which imposes the charter limitation says nothing about branches. Its reference is to companies to be formed, and it prescribes the conditions on which the charter may issue. It is the fourth section of the act that allows extensions to be made by companies acting under a sufficient charter. These extensions are allowed whenever a company may deem them necessary to increase its business to accommodate the public, and but a single limitation upon the right is imposed, viz., that no extension or

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branch shall be constructed upon a street upon which a track is already laid or authorized. There is such a manifest distinction between the charter limitation and that imposed with respect to extensions that the difference can be accounted for only as we understand each to apply exclusively to its own distinct subject, without relation to the other. The limitation in case of the former is that the charter may not authorize a company to construct, maintain, and operate a railway on any street already occupied by the tracks of a railway. The thing not allowed is the chartering of a company where the purpose is to construct an additional track upon a street already occupied and maintain and operate such track. The limitation upon the extension is that it shall not be constructed in any street on which a track of another company has been laid. The evident purpose in each case is to protect the property rights of already existing companies, and perhaps to save the public streets from an excessive servitude of this character which may interfere with the public use of them; but the several limitations are clearly distinguishable.

To accomplish the object in one case it was necessary to expressly disallow the incorporation of companies where the application showed a purpose to adopt a route which had been already appropriated. To accomplish it in the other case, the companies chartered were prohibited from constructing an extension or branch on a street previously occupied; and this is the only prohibition here imposed. The southern terminus of defendant's road as chartered was the northern boundary of the city of Chester. Concededly the company had a right to adopt an extension into and within the city limits, only in so doing it was prohibited by law from constructing a track upon a street where one was already in existence. If it observed this prohibition, and had municipal consent, its right was complete. But the company found the only street which admitted of convenient and direct connection with the extensions it proposed to build already occupied by the tracks of another company. The use of this street for a distance of 4,000 feet was absolutely necessary to carry out the legitimate purpose of the company. To meet this necessity, without transgressing the law which forbade the construction of a parallel line, it acquired the right from the superior company to use the latter's track for the required distance, and was thus enabled to establish a connected system. In so doing it violated no express provision of the law, did not defeat its purposes in any respect, and was clearly acting within the rights implied in the legislative grant. The grant to the company of the right to make extensions carried with it by implication everything, except what was expressly withheld, necessary to make the grant effectual. What was here withheld was the right to construct an additional track where one existed. This the company has not done or attempted to do. What it has done

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does not fall within the letter or spirit of the exception. The answer to this question must be a vindication of the company's right in the premises.

4 and 5. These questions relate to the effect of the abandonment by the defendant company of that part of its chartered route which led to Elwyn, and the substitution therefor of the line to Media. The court below found as a fact that the abandonment of the part of the chartered route here complained of was pursuant to authority derived from the stockholders of the company, that the consent of the townships through which the chartered route led was duly granted, and that the action of the company and the consent of the several municipalities were duly certified to the Secretary of the Commonwealth. We may add that the evidence shows acts of acquiescence and ratification on the part of the city of Chester—not here complaining—quite as conclusive. The proceedings taken to effect a variation from the chartered route being found regular, and the acquiescence of the municipalities affected being shown, it does not rest with the plaintiff to call in question the propriety or necessity of the deviation, or the sufficiency of the defendant's action in this regard. The deviation from the chartered route in this case was determined upon evidently by considerations of public convenience. The defendant company had at least the right to the benefit of such presumption, in the absence of anything appearing to the contrary. In *Penna. Railroad Co. v. Street Railway Co.*, 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839, we held that: "The occasion for such divergence, and its extent, are questions of location, and the decision of them primarily is within the discretion of the railway company. If the variance from the charter route is greater than is necessary, or the charter route itself is open to objection, the commonwealth alone can be heard to make it in the interest of the general public." This proceeding was under Act June 19, 1871 (P. L. 1360). The act authorized no inquiry in such cases except as to the charter right to do the act complained of. Here the defendant company has shown a full legal franchise vested in itself to do what is made the subject of complaint.

The assignments of error are therefore overruled, the appeal is dismissed at the costs of appellant, and the decree is affirmed.

LOUISVILLE & N. R. Co. *v.* GILMORE'S ADM'R.

(Court of Appeals of Kentucky, April 16, 1908.)

[109 S. W. Rep. 321.]

Railroads—Injuries to Pedestrian at Crossing—Negligence.*—A railroad company, charged with the duty of keeping a lookout for pedestrians using a pathway across the track, is not negligent because the fireman withdrew his lookout to coal the engine, though the view of the engineer was cut off.

Same.*—A railroad company, charged with the duty of keeping a lookout for pedestrians using a pathway across the track, was not negligent in failing to have a third person assist the fireman to keep a lookout while he was otherwise engaged, though the view of the engineer was cut off, since the lookout required is a reasonable one, and as good as the circumstances of the case will permit.

Same.†—A trainman, seeing a pedestrian crossing a street and approaching a railroad track, has the right to presume that he will not step in front of the approaching train, and may act on such presumption until it becomes reasonably apparent from his manner that he intends to step on the track.

Same.—A pedestrian was struck by a heavy freight train running at about 15 miles an hour. The bell of the engine was being rung as the train approached the crossing where the accident occurred. The fireman observed, when the engine was 65 feet from the crossing, that the pedestrian was unconscious of the approach of the train, and would step in front of it. It was then a physical impossibility to stop the train to avoid the accident. Held, that the company was not liable.

*For the authorities in this series on the subject of the duty to maintain lookouts upon trains approaching highway crossings, see second foot-note appended to *Southern Ry. Co. v. Hansbrough's Adm'r* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1; *Louisville & N. R. Co. v. Taylor's Adm'r* (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228; foot-note appended to *Louisville & N. R. Co. v. Dick* (Ky.), 12 R. R. R. 314, 35 Am. & Eng. R. Cas., N. S., 314, where all those preceding it are collected.

†For the authorities in this series on the question whether those in charge of trains or street cars have the right to act on the assumption that persons seen on or near tracks will avoid danger from trains or cars, see foot-note appended to *Duteau v. Seattle Electric Co.* (Wash.), 26 R. R. R. 140, 49 Am. & Eng. R. Cas., N. S., 140; foot-note appended to *Norfolk & W. Ry. Co. v. Dean's Adm'r* (Va.), 26 R. R. R. 784, 49 Am. & Eng. R. Cas., N. S., 784; last foot-note appended to *Southern Ry. Co. v. Gullat* (Ala.), 25 R. R. R. 336, 48 Am. & Eng. R. Cas., N. S., 336; foot-note appended to *Rouse v. Detroit Elec. Ry.* (Mich.), 10 R. R. R. 58, 33 Am. & Eng. R. Cas., N. S., 58, where all those preceding it are collected or referred to.

Louisville & N. R. Co. v. Gilmore's Adm'r

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Julia Gilmore's administrator against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Helm & Helm, Benjamin D. Warfield, and H. L. Stone, for appellant.

Forcht & Field and Dodd & Dodd, for appellee.

CLAY, C. T. M. Gilmore, administrator of Julia Gilmore, instituted this action against appellant, Louisville & Nashville Railroad Company, to recover damages for the death of Julia Gilmore, which is alleged to have resulted from the negligence of appellant. From a judgment for \$5,000 in favor of appellee, this appeal is prosecuted.

The death of Mrs. Gilmore occurred under the following circumstances: Appellant maintains double tracks between Louisville and Cincinnati which, in the former city, parallel Frankfort avenue, a public thoroughfare, for a distance of about two miles, the street being on the south and the tracks on the north. Running northwardly from Frankfort avenue and crossing appellant's tracks are various public streets. One of these streets—Bayly avenue—which is located about three-fourths of a mile within the eastern limits of Louisville, extends from Frankfort avenue two squares northward to Field avenue. At the time of the accident double tracks were also maintained on Frankfort avenue by the Louisville Railway Company. These tracks, at a point opposite Bayly avenue, merge into a single track, which thereafter continues eastwardly for several hundred feet, and then changes into a double track opposite Crescent avenue. About 160 feet west of Bayly avenue is an alley extending from the north to the right of way of appellant on the south, and opening thereon. Immediately opposite the mouth of this alley, and on the south side of Frankfort avenue, is Moore's drug store. At the time of the accident there was a plank opposite the mouth of the alley, which led across a ditch on the north side of appellant's right of way. On the south side of appellant's right of way there was a ditch, across which a log or cross-tie was placed. Beginning at a point some 200 or 300 feet east of Bayly avenue the tracks of appellant describe a curve, the outer rim being to the north and ending between Bayly avenue and the alley. On the line between Frankfort avenue and the right of way are telephone, telegraph, electric light, and trolley poles. The street is slightly elevated above the tracks. At a point about 1,000 feet east of the place of the accident the elevation is about 5 feet.

The death of Mrs. Gilmore occurred about 5 o'clock on the

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afternoon of July 4, 1905. The testimony shows that she left the rear of her premises and crossed the tracks of appellant and Frankfort avenue, and went to Moore's drug store on the south side of Frankfort avenue. Leaving the drug store, at which time it was broad daylight, she allowed an interurban car of the Pewee Valley line to pass. At the time there was a Fourth of July picnic in progress at a Catholic institution in the neighborhood, and a great many street cars of the Louisville Railway Company were passing to and fro. Children of the neighborhood were shooting firecrackers and torpedoes on the sidewalk and in the street adjacent to the drug store, and considerable confusion prevailed. Mrs. Gilmore walked rapidly across the street, a distance of 64 feet; thence 20 feet more on to the first or southernmost track of appellant; thence 10 feet more, close to, but not on, the second track, where she was struck. The train that struck Mrs. Gilmore was a freight train consisting of an engine, 22 loaded and 2 empty cars, and a caboose. It was on time, and was running at about 12 to 15 miles per hour. When the accident occurred the engineer was keeping a lookout, and the bell of the engine was ringing. The fireman was also on a lookout until the engine was within a few feet of Bayly avenue. After looking ahead and seeing no one either on or approaching Bayly or Hite avenues, he stepped down in the deck to put coal in the furnace. As he ceased shoveling and stepped to the gangway he saw the body of Mrs. Gilmore fall from the pilot beam. He then notified the engineer, and the train was stopped.

The evidence conduces to show that the pathway leading from the mouth of the alley across appellant's tracks to Moore's drug store had been used by the public for such a length of time as to raise the presumption of knowledge or acquiescence on the part of appellant. It is not contended that the engineer saw, or could have seen, Mrs. Gilmore in time to prevent the accident, for, being on a curve, his view to the left was cut off; but it is contended that it was the duty of appellant to keep a lookout for persons using the pathway in question, and that the negligence of appellant consisted in the fireman's withdrawing his lookout at a time and place where the lookout by the engineer was practically of no avail. Assuming that the evidence was sufficient to impose upon appellant the duty of keeping a lookout at the place of the accident, was it negligence on the part of the fireman to coal the engine under the circumstances? From the evidence in the case it appears that one of the principal duties, if not the chief duty, of the fireman, is to fire the engine. Schedules must be maintained and trains run on time. Otherwise the safety of the passengers and employees would be greatly imperiled. In order that trains may keep their schedules and run on time it is absolutely necessary that the engine be properly coaled. We are unable, therefore, to say that, because the fireman withdrew his

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lookout for the purpose of performing another duty equally important and necessary, the appellant was guilty of negligence. *Louisville & Nashville Railroad Co. v. Creighton, etc.*, 106 Ky. 42, 50 S. W. 227. Nor do we think it negligence on the part of appellant not to have had a third person present to assist in keeping a lookout when the fireman was otherwise engaged. The lookout required by law is a reasonable one to be kept by those in charge of the engine. Because of the condition of the tracks, or of the fact that obstructions sometimes intervene, it may be that such lookout will not always be perfect; but all the law requires, or should require, is that it shall be as good as the circumstances of the case will permit. To require an additional person to keep a lookout when the fireman is engaged in coaling the engine would be to place almost the entire responsibility for accidents on the railroad company. The law does not go to this extreme. There is no liability where those charged with the duty of keeping a lookout keep such a lookout.

But even assuming the extreme position that it was negligence on the part of the fireman to stop keeping a lookout while he fired the engine, the appellee could not recover unless Mrs. Gilmore's death was due to such negligence. The evidence shows that the train was running about 15 miles an hour. Mrs. Gilmore was walking rapidly across the street and tracks, moving at the rate of about 3 miles an hour. If the fireman then had been upon the lookout and had seen Mrs. Gilmore crossing the street, he would have had the right to presume that she would not step in front of the approaching train until it became reasonably apparent from her manner that she intended to do so. *Ford's Adm'r v. Paducah City Railway*, 90 S. W. 355, 30 Ky. Law Rep. 644, 8 L. R. A. (N. S.) 1093; *Johnson's Adm'r v. Louisville & Nashville Railroad Co.*, 91 Ky. 651, 25 S. W. 754. There was a space of 13 feet between the north and south bound tracks of appellant. When Mrs. Gilmore reached the south rail of the north-bound track she was 13 feet from the south rail of the south-bound track. The engine was then about 65 feet distant. If the fireman had seen her at this point, and it was then reasonably apparent that she was unconscious of the approach of the train, he would then have had to call the attention of the engineer to the fact, and the engineer would then have had to blow the whistle or stop the train in time to have prevented the accident. This, we think, would have been a physical impossibility.

It may be that the accident happened because of Mrs. Gilmore's deafness, or it may be that her mind was so intent upon something else, or that her attention was so absorbed, that she failed to notice the approaching train. It was her misfortune that she failed to hear it. It was a large freight train, consisting of 24 cars and a caboose. The bell on the engine was being

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rung, the train itself was making a loud noise, and the slightest care on her part would have enabled her to escape danger. The accident, deplorable and unfortunate though it was, was not due to any negligence on the part of the appellant. It is simply a case of one's walking in front of an approaching train at a time when no diligence or effort on the part of those in charge of the train could have discovered or prevented her peril.

We are, therefore, of the opinion that the trial court should have peremptorily instructed the jury to find for appellant. No other questions raised on this appeal are decided.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

O'BANNION'S ADM'R v. SOUTHERN RY. CO. IN KENTUCKY.

(Court of Appeals of Kentucky, May 12, 1908.)

[110 S. W. Rep. 329.]

Railroads—Operation—Companies Liable for Injuries—Permitting Use of Track by Other Company.*—Where defendant railway company had licensed the C. company to run its cars over defendant's line, defendant was responsible for whatever accident took place in the operation of the C. company's train, to the same extent as if the train had been its own.

Same—Injuries to Passengers—Care Required—Children.†—Where a child strayed on defendant's railroad track at a point where she had no right to be and was killed by a train, she being a trespasser, the operatives of the train by which she was struck owed her no duty, except to exercise reasonable diligence to prevent injury to her after her peril was discovered.

Same—Persons on Track—Anticipation of Presence—Lookout.‡—The fact that decedent was an infant only two years old at the time she strayed on defendant's railroad track and was killed by a train added no duty or responsibility on the railroad company's employees to anticipate her presence on the track or to keep a lookout for her in advance of actually seeing her peril.

*See foot-note appended to *St. Louis, etc., Ry. Co. v. Chappell & Billingsley* (Ark.), 24 R. R. R. 789, 47 Am. & Eng. R. Cas., N. S., 789; foot-notes appended to *Hollins v. New Orleans & N. W. R. Co.* (La.), 28 R. R. R. 283, 51 Am. & Eng. R. Cas., N. S., 283.

†For the authorities in this series on the subject of the care due trespassing children from railroad companies, see third foot-note appended to *Goldstein v. People's Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 529, 42 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to *Ellington v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 174, 42 Am. & Eng. R. Cas., N. S., 174; foot-notes appended to *Hamilton v. Detroit, etc., Ry. Co.* (Mich.), 22 R. R. R. 669, 45 Am. & Eng. R. Cas., N. S., 669; last foot-note appended to *Chambers v. Milner Coal & Ry. Co.* (Ala.), 20 R. R. R. 277, 43 Am. & Eng. R. Cas., N. S., 277.

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Same—Evidence.—In an action for death of a child two years old by being struck by a train while trespassing on defendant's tracks, evidence held insufficient to warrant a finding that the operatives of the train by which she was struck discovered her peril in time to prevent the accident.

Nunn, J., dissenting.

Appeal from Circuit Court, Woodford County.

"Not to be officially reported."

Action by Alice O'Bannion's administrator against the Southern Railway Company in Kentucky. Judgment for defendant, and plaintiff appeals. Affirmed.

Edwards & Godson, for appellant.

Wallace & Harriss and *Edward Colston*, for appellee.

BARKER, J. On the 31st day of March, 1905, the Cincinnati, New Orleans & Texas Pacific Railway Company was prevented from running trains over its track between Lexington and Georgetown on account of a derailment or wreck between those cities, which, for a while, effectually blocked transportation. In order to transport passengers and freight with as much dispatch and with as little inconvenience to its patrons as was possible under the then existing circumstances, that company detoured its trains over the track of appellee, from Lexington, through Versailles and Midway, to Georgetown, and then ran them from the last-named city to their destination, over its own track. One of these detouring trains was a very heavy, through passenger train from the South, consisting of a locomotive, tender, and eight or nine coaches. This train passed through Midway on the morning of the 31st day of March, 1905, going in the direction of Georgetown. While going down a heavy grade, at a point about two miles from Midway, and about 100 feet from a private farm crossing, it ran over and killed appellant's intestate, a little girl slightly over two years of age. The appellant, the father of the child, qualified as administrator of her estate in the Woodford county court, and then instituted this action against appellee, charging negligence and carelessness. The issues were made, and a trial had. At the conclusion of the testimony introduced by appellant, the trial court, on motion of appellee, peremptorily instructed the jury to find a verdict for it, and, on the return of that verdict by the jury it entered a judgment thereon, in accord therewith, and this cause is now before this court on an appeal from that judgment.

The appellee railroad corporation having licensed the Cincinnati, New Orleans & Texas Pacific Railway Company to run its cars over its line, it is as responsible for whatever accident took place in the operation of the train as if it had been one of its own, and therefore, so far as the responsibility of the appellee

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for the injury involved here is concerned, we will treat the case as if the accident was occasioned by one of its own trains. *McCabe's Adm'r v. Maysville & B. S. R. Co.*, 112 Ky., 861, 66 S. W. 1054; *Louisville & Nashville R. R. Co. v. Breeden's Adm'r*, 111 Ky. 729, 64 S. W. 667.

The little child killed by the accident above detailed was a trespasser upon the track of appellee, and therefore its employees in charge of the train which caused the injury owed her no duty except to use reasonable diligence, after her peril was discovered, to prevent the accident. *Chesapeake & Ohio Railway Co. v. Nipp's Adm'r*, 100 S. W. 246, 30 Ky. Law Rep. 1131; *Chesapeake & Ohio Railway Co. v. Barbour's Adm'r*, 93 S. W. 24, 29 Ky. Law Rep. 339; *Louisville & Nashville Railroad Company v. Redmon's Adm'r*, 91 S. W. 722, 28 Ky. Law Rep. 1293; *Hulsey's Adm'r v. L. H. & St. L. Ry. Co.*, 87 S. W. 302, 27 Ky. Law Rep. 969; *Davis' Adm'r v. Chesapeake & Ohio Railway Co.*, 116 Ky. 14, 75 S. W. 275; *Louisville & Nashville Railroad Co. v. Vittitoe's Adm'r*, 41 S. W. 269, 19 Ky. Law Rep. 612; *Louisville & Nashville Railroad Co. v. Logsdon's Adm'r*, 118 Ky. 600, 81 S. W. 657; *Freel's Adm'r v. L. H. & St. L. Ry. Co.*, 89 S. W. 143, 28 Ky. Law Rep. 76; *Nashville, Chattanooga & St. Louis Railway Co. v. Bean's Executor* (decided May 8, 1908) 110 S. W. 328. And the fact that the decedent was an infant only two years old added no duty or responsibility on the railroad's employees to anticipate her presence on the track, or to keep a lookout for her in advance of actually seeing her peril. *Freel's Adm'r v. L. H. & St. L. Ry. Co.*, *supra*; *Dorsey's Adm'r v. Louisville & Nashville Railroad Co.*, 80 S. W. 1131, 26 Ky. Law Rep. 232; *Louisville & Nashville Railroad Co. v. Logsdon's Adm'r*, 118 Ky. 600, 81 S. W. 657.

It only remains, then, to ascertain whether or not the employees in charge of the train saw the child's peril in time, by the exercise of ordinary care, to prevent her injury. It was proved for the plaintiff that the track, from where the train rounded a curve to the point where the child was struck by the engine, a distance of 549 feet, was perfectly straight, and that those in the cab of the engine could have seen her for the whole time the train was traversing this distance, if she was actually on the track; that from a point 549 feet from where the child was killed the engineer and fireman were both observed looking out of the window of the cab, straight down the track, in the direction where the little girl was killed. It was further shown that, when the engine reached a point within 104 feet of the child, the engineer sounded the alarm whistle and applied the brakes, showing that, at that point at least, he had observed her peril. The O'Bannion home was about 100 feet from the railroad track, and there was a little path leading from a corner of the yard to it. Just where this path reached the track the child's bonnet was

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found lying between the rails. She was killed 75 feet from this point. The record fails to disclose at what time the child went on the track, or at what point. No one saw her, so far as the evidence shows, except at the place where she was killed. So far as the evidence shows to the contrary, she may have gone on the track at the point where she was killed, and after the train was within so short a distance of her as to preclude the possibility of her being saved after her peril was discovered.

It is not contended that the train could have been stopped and the injury prevented between the point where the alarm whistle was sounded and where the tragedy occurred, a distance of 104 feet. Of course, if the child had been on the track when the train came around the curve, 549 feet away, there was nothing to prevent the engineer and fireman from seeing her from that point on, and as the evidence showed they were looking down the track from that point on, it could well be assumed that they saw her, and to see her at all upon the track, considering her age, was to realize her peril. But we have no right to assume, in the absence of evidence, that the child was on the track all the time while the train was running the distance of 549 feet, to where she was struck. She might have gone on the track and off of it again several times while the train was traversing that distance. Certainly, if she had been on the side of the railroad track, she could have walked on it and imperiled her life long after the train reached a point of proximity to her, which would have precluded the possibility of saving her life after her peril was discovered. But it is said that, because her bonnet was found on the railroad track 75 feet from where she was killed, it must be presumed that she had dropped it at the point where it was found and walked the distance of 75 feet to the point of the accident, and that this would show she had been on the railroad track during the whole time the train was coming the 549 feet from the curve in the road. We do not think this is a legitimate deduction. There is no evidence as to how long the child had been playing on the track, or in the neighborhood of it. We do not know whether her bonnet was dropped by her at the point where it was found, or whether it was blown there by the winds, or what cause or force or circumstance brought it there. If we assume that the child dropped it there when she got upon the track, it does not follow that she remained on the track and walked down to the point of 75 feet away, where she was finally killed. For aught that appears to the contrary, she may have been on and off the track several times after she dropped her bonnet at the point where it was found before she finally reached the place where she was killed. We cannot assume the existence of any unproved fact necessary to establish the plaintiff's cause of action. The burden was upon him to prove every such material fact, and, if he failed so to do, then he cannot recover.

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The facts in the case of *Freel's Adm'r v. L. H. & St. L. Ry. Co.*, before cited, were very similar to those in the case at bar. There an infant 17 months old wandered upon the railroad track, and it was shown that she could have been seen by those in charge of the train for, at least, 300 yards from where the accident occurred, and it was insisted that this was evidence sufficient to take the case to the jury. On that subject it was said: "There was no evidence introduced to show that the child was on the track when the train reached the point where it is claimed it could have been seen by those in charge of the train. There is nothing in the record to show that the child may not have gotten on the track just at the time those in charge of the train discovered its peril and endeavored to prevent the accident. It is true, one witness testified that some time before the accident she had seen the child on the track; but the train was not then in sight, nor did the witness know that it was then approaching. Therefore the evidence failed to show that the child remained on the track from the time it was seen by this witness until it was killed. It may have walked on and off the track two or three times after the witness saw it upon the track before it was killed. We do not think that there was any evidence from which the jury could have inferred that the child was killed by the negligent act of those in charge of the train." Applying the reasoning of the foregoing opinion to the case in hand, there was no evidence to show that the little girl was upon the track when the engine rounded the curve and reached a point from where those in charge of it would have seen her had she then been upon the track, or that she did not get on the track just before the train reached her, and when no effort would have saved her life. It necessarily follows that the plaintiff failed to make out his case, in the absence of evidence establishing these very material facts, and, this being so, the peremptory instruction was properly given. Sympathy for the little sufferer cannot be substituted for the lacking evidence necessary to establish the plaintiff's cause of action.

Judgment affirmed.

ALABAMA GREAT SOUTHERN R. CO. *v.* GODFREY.

(Supreme Court of Alabama, Feb. 13, 1908. Rehearing Denied July 3, 1908.)

[47 So. Rep. 185.]

Negligence—Care of Premises—Obligation to Trespasser.—An owner owes no duty to a trespasser to make his premises safe.

Railroads—Injuries to Persons on Track—Who are Trespassers.*—Ordinarily the mere acquiescence by a railroad in the use by the public of its right of way does not amount to permission, and the public using the way are trespassers.

Carriers—Injuries to Passengers—Defective Pathways—Complaint.—A complaint in an action for injuries to a passenger which alleges that he alighted at a depot in the nighttime, that while passing from the depot along a much-traveled pathway he fell into a ditch and was injured, that the pathway was on the carrier's premises, and was habitually used with its knowledge and acquiescence by its passengers in leaving its depot and trains, at and before the time of the injury by the invitation of the carrier, and that the carrier negligently allowed the pathway to remain unsafe, makes a case of a passenger leaving a train by a route which he, as well as passengers in general, was invited by the carrier to use, and states a cause of action as against a demurrer.

Appeal and Error—Rulings on Pleadings—Prejudicial Error.—The error, if any, in refusing to strike allegations in a complaint, substantially repeated elsewhere and essential to a cause of action, is not prejudicial.

Carriers—Depot Grounds—Use by Passengers—Directions of Station Agent—Authority of Agent.—In the absence of a showing to the contrary, it is not within the scope of a station agent's authority to suggest to or invite passengers leaving trains at the station to go to any particular hotel not owned by the carrier, or to follow any particular route in reaching such hotel, unless such route has otherwise received the sanction of the carrier, though it may be within his authority to inform passengers alighting from trains of a safe way of egress from the depot or approaches reasonably near thereto.

Same.—A statement of a station agent, made to a passenger alighting from a train at night, in going into the depot to deposit his grip,

*For the authorities in this series on the question who are, and are not, licensees on railroad tracks or premises, see second foot-note appended to *Chesapeake Beach Ry. Co. v. Donahue* (Md.), 28 R. R. R. 272, 51 Am. & Eng. R. Cas., N. S., 272; first foot-note appended to *Minot v. Boston & M. R. R.*, 27 R. R. R. 512, 50 Am. & Eng. R. Cas., N. S., 512; foot-note appended to *Calwell v. Minneapolis & St. L. R. Co.* (Iowa), 28 R. R. R. 588, 51 Am. & Eng. R. Cas., N. S., 588 (what constitutes a license to travel on a railroad track or right of way).

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that a hotel man was there with a light, and that if the passenger would hurry he could catch up with him, amounted only to the agent's individual suggestion, for which the carrier was not responsible, unless the route taken to the hotel was within depot grounds or approaches thereto or was a passageway which the carrier had otherwise expressly or impliedly invited the public to use as a means of ingress or egress to or from its depot and platforms.

Negligence—Care of Premises—Trespassers.—The rule that owners of land on which the public is expressly or impliedly invited to enter must keep the same free from pitfalls does not apply to places strictly private, or where persons are neither expected nor expressly or impliedly invited to go.

Carriers—Depot Platforms and Approaches—Care Required.†—A railroad company owes the persons having business with it the duty of keeping in safe condition all portions of its depot, platforms, and approaches thereto, to which the public will naturally resort, and all portions of its station grounds reasonably near to the platforms, where passengers will naturally go.

Same.—A culvert on a main line of a railroad 235 yards from a depot is not an approach to the depot platform or a portion of the station grounds reasonably near to the platform, where passengers will be likely to go, within the rule requiring a railroad to keep in safe condition all portions of its depot platforms and approaches thereto and all portions of its station grounds reasonably near thereto, where passengers will naturally go.

Negligence—Use of Another's Premises—Care Required.—One acting on the invitation has the right to presume, from knowledge of that fact, that the premises he is invited to use are kept reasonably safe, and he is not required to be careful to keep on the lookout for pitfalls; but one acting without knowledge of the invitation is negligent ordinarily in presuming safely in premises of the nature and condition of which he was ignorant, especially at night, and a reasonably prudent man will exercise more care in using premises, where he is ignorant of any invitation to use them, than he will be if he knows that he is invited to use them.

Same—"Invitation."—The word "Invitation," within the rule that an owner of land who holds out any invitation for others to go thereon must keep his premises in a safe condition, imports that the person entering on the premises did not act merely for his own convenience and pleasure, and from motives to which no act of the owner contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors, and that such use was not only acquiesced in by the owner, but that it was in accordance with the intention and design with which the place was adapted and prepared or allowed to be so used.

Same.—A mere passive acquiescence by an owner in a use of his

†See first foot-note appended to *Chicago, etc., Ry. Co. v. Pritchard* (Ind.), 28 R. R. R. 146, 51 Am. & Eng. R. Cas., N. S., 146.

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land by others involves no liability; but, where he directly or by implication induces persons to enter on his premises, he assumes an obligation that they are safe and suitable for use, and for a breach of this obligation he is liable to a person injured thereby.

Railroads—Injuries to Persons on Track—Right to Go on Track.†—Ordinarily the right of way of a railroad is its exclusive property, and mere acquiescence in the use thereof by the public does not confer on the public a right to use it, nor create any obligation to look out for the persons using it, other than the general duty of lookout for obstructions.

Carriers—Maintenance of Exits from Depot Grounds to Highways—Obligation.—Where a railroad furnished open, free, and safe exit from its depot to a highway, mere acquiescence by it in the use of its track by passengers at a place 235 yards from the depot, while the passengers were going to a hotel in which it had no interest, did not make it liable to such passengers beyond its liability to mere licensees.

Same.—A carrier is under no obligation to maintain a safe passageway for its passengers to and from any particular hotel, unless under exceptional circumstances, such as eating houses where trains are stopped for passengers to get meals, or hotels in which the carrier is interested, or situated within or adjoining depots or depot grounds; and a carrier, furnishing safe and sufficient egress from its depot grounds, complies with its obligation to its passengers.

Same.—Evidence held to show that passengers using a pathway across a railroad right of way did not use it on the invitation of the company, and the persons using it could not recover for injuries sustained in consequence of the defective condition of the pathway.

Appeal from Circuit Court, Sumter County; S. H. Sprott, Judge.

Action by Ernest B. Godfrey against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

†See last foot-note appended to *Southern Ry. Co. v. Stewart* (Ala.), 28 R. R. R. 606, 51 Am. & Eng. R. Cas., N. S., 606; last foot-note appended to *Chesapeake Beach R. Co. v. Donahue* (Md.), 28 R. R. R. 272, 51 Am. & Eng. R. Cas., N. S., 272; *Chicago, etc., Ry. Co. v. Pritchard* (Ind.), 28 R. R. R. 146, 51 Am. & Eng. R. Cas., N. S., 146; *Birmingham Ry., etc., Co. v. Jones* (Ala.), 27 R. R. R. 781, 50 Am. & Eng. R. Cas., N. S., 781; foot-note appended to *Rader's Adm'x v. Louisville & N. R. Co.* (Ky.), 27 R. R. R. 528, 50 Am. & Eng. R. Cas., N. S., 528; *Cook v. Southern Ry. Co.* (S. Car.), 26 R. R. R. 730, 49 Am. & Eng. R. Cas., N. S., 370; *Chesapeake & O. Ry. Co. v. Nipp's Adm'x* (Ky.), 26 R. R. R. 150, 49 Am. & Eng. R. Cas., N. S., 150; first foot-note appended to *Norfolk & W. Ry. Co. v. Denny's Adm'r* (Va.), 26 R. R. R. 124, 49 Am. & Eng. R. Cas., N. S., 124; *Frye v. St. Louis, etc., R. Co.* (Mo.), 26 R. R. R. 75, 49 Am. & Eng. R. Cas., N. S., 75; *Elliott v. Louisville & N. R. Co.* (Ky.), 26 R. R. R. 20, 49 Am. & Eng. R. Cas., N. S., 20; *Hoback's Adm'r v. Louisville, etc., Ry. Co.* (Ky.), 26 R. R. R. 8, 49 Am. & Eng. R. Cas., N. S., 8.

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A. G. & E. D. Smith, for appellant.

Bowman, Harsh & Beddow, for appellee.

HARALSON, J. The trial in the court below was had upon the first and fourth counts of the complaint as amended, and the case as stated by these counts was substantially as follows:

Plaintiff had been carried as a passenger on one of defendant's trains to Epes, Ala., where he alighted in the nighttime, and while passing from the depot along a much-traveled pathway leading therefrom, and while near to the depot, he fell from said pathway into a ditch and was thereby seriously injured; that said pathway where plaintiff fell, was on defendant's premises and was habitually used, with defendant's knowledge and acquiescence, by defendant's passengers, in leaving its depot or trains at and before the time of plaintiff's alleged injury, by the invitation of the defendant. The fourth count contains the additional averment that the pathway led to a hotel, near by the depot, to which plaintiff was going. The negligence averred in the first count is as follows: "And defendant negligently caused or allowed said pathway or road to be or remain unsafe for passengers using the same as aforesaid in this, that the same was not properly or sufficiently lighted or otherwise properly and sufficiently safeguarded." The negligence as alleged in the fourth count was, that the defendant with knowledge of the use of the pathway as aforesaid, and with knowledge of its danger, "negligently allowed plaintiff to pass along said pathway or road over said ditch, gulley or viaduct, when the same was not properly lighted or otherwise safeguarded, without proper warning or notice of the danger thereof." Defendant filed a motion to strike these portions of the complaint which averred in substance the habitual use of the pathway by defendant's passengers, in leaving the depot, with defendant's acquiescence. The motion was overruled and this ruling assigned as error.

The same grounds of demurrer were interposed to each of these counts, and were in substance, that each of said counts showed that the plaintiff was a trespasser, or a mere licensee, upon the defendant's right of way; that no duty was shown to rest on the defendant to light or safeguard the place where the plaintiff fell, and that said place was not shown to have been on the depot premises of the defendant and that there was no averment of willful or wanton injury. The overruling of these demurrers by the court is also assigned as error.

It is insisted, in argument by the appellant, that the plaintiff was a trespasser or a mere licensee under the facts stated in the first and fourth counts, on which the case was tried. In support of this contention, as well as in support of the motion to strike portions of these counts, appellant cites the case of *M. & C. R. R. Co. v. Womack*, 84 Ala. 149, 4 South. 618, and other cases of a similar nature. The opinion in that case states: "He

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was clearly a trespasser upon the right of way of the defendant. Any person who enters and walks at places where the public have no right, *unless by the invitation or license of the company*, is a trespasser, and assumes the peril of the position in which he has voluntarily placed himself." (Italics ours.) The doctrine laid down in the above case, that the owner owes no duty to a trespasser to make his premises safe, and that ordinarily the mere acquiescence in the use of the right of way by a railroad company does not amount to permission, is well settled by numerous decisions of this court; but they have no application to the case stated in the complaint here in question, which specifically avers that this usage was by "invitation of the defendant." Different rules apply in cases where the parties injured are present on the premises by invitation or license of the owner, express or implied. *Montgomery & Eufaula R. R. Co. v. Thompson*, 77 Ala. 456, 54 Am. Rep. 72, and other cases hereinafter cited.

A fair construction of the amended complaint makes a case of a passenger leaving a train and depot by a route which he, as well as passengers in general, was invited to use by the railroad company, which route was negligently left unsafe and unguarded, by reason of which he was injured. It follows that, so far as the pleading discloses, he was not a trespasser or licensee, and that there was no error in overruling the demurrers. As to the motion to strike, it was at most directed at mere surplusage, the matter thus attacked being substantially repeated elsewhere in the amended counts in connection with the averment, that such habitual usage of the dangerous pathway by defendant's passengers was not only with its acquiescence, but by its invitation; and without proof of such invitation, under the averments of the plaintiff would clearly not be entitled to recover. Hence if there was any error in overruling the motion to strike, it was error without injury.

As the second count was charged out of the case and the third count went out on demurrer sustained, their consideration is not necessary here. As stated, the case was tried on the first and fourth counts.

The defendant pleaded the general issue and filed special pleas setting up contributory negligence.

The facts as shown without conflict in this case were substantially as follows: The plaintiff was a passenger on defendant's train from Birmingham to Epes, where he arrived on a very dark and rainy night. The train stopped at the depot, plaintiff left the train, and went into the depot to leave a satchel, expecting to spend the night at McGee's Hotel at Epes, where most travelers usually stopped. There was another hotel close to the depot, but few traveling men went there. McGee's Hotel was situated something more than 235 yards northward from the depot, near the railroad on the east side. Plaintiff had stopped at McGee's

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Hotel once before, when he came in a buggy and went to the hotel by the dirt road. Plaintiff had never gone up the railroad to the hotel, and up to the time of the injury did not know of the conditions existing on that way. The dirt road, of which plaintiff had knowledge, crossed the railroad near the depot on the south side and ran around northward in front of the stores at Epes and over a bridge with banisters spanning a waterway up to McGee's Hotel. This same waterway also passed under the railroad through an uncovered culvert, about 18 feet deep and cut through the rock, at a point on the railroad 235 yards north from the depot. When plaintiff went into the depot to put up his satchel, one Sims, acting as defendant's depot agent, said to him that the hotel man was there with a light and that if he would hurry he could catch up with him. Plaintiff immediately started out in the darkness to follow the man with the light which he saw going up the track toward the hotel; that as plaintiff left the depot a man, shown to have been defendant's night operator, hollowed to him, "Look out for the hole up there." Plaintiff kept on up the track, and about the time the man with the light turned up the embankment toward the hotel, plaintiff fell through into the culvert and was very seriously injured; one leg had to be amputated and the other was stiffened.

It was further shown that near the hotel there were some steps leading from a path from the hotel down to the railroad track which was, at that point, in a shallow cut; that defendant's passengers in going to and from the hotel and the depot usually, and had for a number of years, used a well-beaten path up the main line of defendant's railroad track from the depot and across the culvert and up these steps to the hotel, especially when the roads were muddy, being the same route pursued by the man with the light. It was not shown whether this custom was confined to daytime only, or extended to night and day both. The railroad company had never objected to this use of its track, though it had been so used for a number of years. The evidence did not show who put up the steps from the cut to the path leading to the hotel, but it appeared that they had been removed several years before by the section foreman and the railroad company's supervisor had them put back; that the supervisor's duty was to keep up the railroad tracks and see that they were in good condition. It was 50 yards further from depot to hotel by the dirt road than by way of the railroad track. There was no evidence as to the depot agent's scope of duty. The railroad track over the culvert was not floored or covered, and no light or other warning placed there. There was some evidence tending to show that after the injury plaintiff said he had no one to blame but himself, but this he denied.

The plaintiff stated on cross-examination that defendant had never expressly invited, or given him permission to walk on its track or to use its track as a public highway.

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The foregoing being the facts in evidence, the first inquiry arising is, was there any evidence from which it might reasonably be inferred that the plaintiff was expressly or impliedly invited by the defendant to use its railroad track as he was using it at the time he fell to his hurt? The plaintiff having testified that he was not expressly invited or permitted by the defendant to use the way he pursued, and the evidence, for that matter, failing to disclose any express invitation, the question is narrowed down to whether, under the facts in evidence, he was impliedly invited. In this connection we note that the court below charged the jury, in written charge No. 20, "that even if an agent at the depot of defendant told plaintiff that Mr. McGee had gone on with a lantern to the hotel, and that if he went in a hurry, he could catch up with him, or words to that effect, such remarks on the part of such agent would not bind the defendant, or amount to an invitation by the defendant to the plaintiff in this case to use the track of defendant as a highway to go to the hotel from the depot." With the lights before us, this charge was not improperly given. It was not shown by the evidence to have been within the scope of the agent's duties or authority to make such suggestion, and nothing appearing to the contrary it would, as a general rule, seem to be entirely without the scope of a station agent's authority as a representative of a railroad company to suggest to, or invite, passengers leaving its trains or depot, to go to any particular hotel not owned by the company, or to follow any particular route in reaching such hotel, unless such route otherwise received the sanction of the company's invitation; though it might well be within such agent's authority and duty to inform passengers alighting from trains of a safe way of egress from the depot or depot platforms or approaches or grounds "reasonably near thereto," which he is apparently placed in charge of. The remark of the station agent in this case can hardly be regarded as more than his individual suggestion for which the defendant was in nowise responsible, unless it could be said to appear from the evidence that the route taken up the track to the hotel was within the station or depot grounds or approaches reasonably near thereto, or was a passageway which the railroad company had otherwise than by this remark of the agent expressly or impliedly invited the public having business with the railroad company, to use as a means of ingress or egress to or from its depot and platforms, within which limitations it might be that the station agent in charge of such depot and grounds would have implied authority from the railroad company to give information and directions to such persons. While this remark has some bearing on the question of contributory negligence, it could hardly be said that a depot agent could by a mere word extend the boundaries of the depot grounds and approaches for the reasonable safety of which the law imposes a

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duty upon the railroad company; and so the question reverts, independently of the remarks of the agent, to the inquiry (1) whether the pathway taken and used by the plaintiff at the time of the injury constituted a part of the depot grounds or approaches, (2) or was a passageway, which the defendant railroad company impliedly invited its passengers, leaving its trains and depot (including the plaintiff), to make use of, in making their egress therefrom.

Let us first consider the general invitation which is implied by law, and the consequent duty imposed, pertaining to the use of railroad depots, platforms, exits and approaches, and the grounds reasonably near thereto, all of which may generally be comprehended by the term "depot grounds," what they are and how far they extend.

In the case of *Montgomery & Eufaula Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72, in discussing this question, that opinion first asserts the proposition, that there is a common duty resting upon all owners of real estate, upon which the public is expressly or impliedly invited to enter, that it shall be kept free from traps, and pitfalls, and that for a neglect of this duty, parties injured thereby may recover damages; but that this rule does not apply to places strictly private, or where persons are neither expected nor expressly or impliedly invited to go. It then applies the foregoing principles to railroad station property in the following language: "All the property of a railroad company, including its depots and adjacent yards and grounds is its private property, on which no one is invited, or can claim the right to enter, save those who have business with the railroad. Under this classification, however, we must include attending friends and protectors, who accompanying friends to the train to aid them in getting on, in procuring tickets, in checking baggage, and kindred services. The same license is accorded to protecting friends, when the traveler is to leave the train. To persons filling these classes, the railroad corporation owes special obligations of duty, different from those due to the general public. While the former come by invitation, express or implied, the latter are mere pleasure seekers, or are prompted by curiosity. For the use and comfort of the former class, railway companies are bound to keep in safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go. Within these boundaries, a defect of structure which is likely to, or does cause injury, or any other trap or pitfall producing a like result, will fasten a liability on the railroad owing the duty. Of similar obligations to this primary class, is the duty to provide safe waiting rooms, and to keep the

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depot and platform well lighted in the nighttime.” Can it be said that a culvert on the main line of the railroad track 235 yards away from the depot is an “approach” to the platform, or “a portion of the station grounds reasonably near to the platform, where passengers would naturally or ordinarily be likely to go,” within the meaning of the above-stated rule? Manifestly not. In the case from which we quote, this rule was held not to extend to a point on the bluff of a river about 50 yards from the depot, at which plaintiff, who had just got off defendant’s train, fell over in the dark in an effort to reach a closet on the bank of the river, which was not lighted, and the bluff not guarded. The same general principles quoted above are followed in *A. G. S. R. R. v. Arnold*, 80 Ala. 600, 2 South. 337, where the duty to light the platform is laid down, and in *Watson v. E. T. V. & G. Ry. Co.*, 92 Ala. 320, 8 South. 770, and same case; 94 Ala. 634, 10 South. 228. But the cases last cited hold that a railroad company is liable in damages to a passenger, who, on alighting by night at a station, where there was an eating house for passengers, crossing a platform between the track and the veranda of the house, returning across another platform similarly situated, receives personal injuries from its defective condition; when the evidence shows that both of the platforms, though built by the persons who erected the hotel, were on the railroad’s right of way, that there was no light at the spot, which was only 37 feet from center of track, and that the defective platform, which was opposite to the railroad offices in the building, had been formerly used by the railroad, though not for several years. This platform was held to be a part of defendant’s “station grounds” (92 Ala. 324, 8 South. 772); that “defendant allowed it to remain there, a standing suggestion and invitation to its use by passengers”; that “the invitation was accepted and passengers frequently used it in going to and from trains”; that it was therefore defendant’s duty to keep it in a safe condition. This brings out what might be called a visual invitation—an invitation by the reasonable appearance of things. This is further emphasized in the case (94 Ala. 636, 10 South. 228) where it is said: “We cannot suppose that travelers are informed as to the ownership or control of pass-ways thus circumstanced. They act on the appearance of things, and are authorized to so act. Seeing the two bridges or platforms extending from the railroad’s platform proper to the ticket office and eating house, they may well suppose that they are invited to take either.” There can be no doubt of the correctness of the holding in these cases, that those platforms were within the depot grounds and that an invitation would be implied by the very appearance of things, and the liability in such case would not have been affected even though the land over which the approach ways extended was not the property of the railroad. See, also, *Skottowe v. Railroad Co.*, 22 Or. 430, 30 Pac. 222, 16 L. R. A.

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593, and notes; L. N. A. & C. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193, and notes; Johns v. C. C. & A. R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 706. In the Lucas Case, just cited, it is said that it is the duty of the railroad company "to provide means for passengers to safely enter its cars at stations, and that duty also requires the carrier to make it safe for them to leave its cars and stations. After the passenger has left the cars and stations of a railway carrier, its duty as a carrier ceases, but not until then." This duty continues until the passenger has left the depot grounds, as a general rule, or has had a reasonable time to do so.

In the case of Ensley Railway Co. v. Chewning, 93 Ala. 249 South. 458, the plaintiff was a passenger from Birmingham to Coalburg, and had gotten off the defendant's train on its main line to take a train on its branch line in the night. He walked up the track a short distance and was struck by the train. It was remarked in the opinion, that "under our decisions a trespasser cannot maintain an action against a railroad company for injuries sustained while trespassing upon its roadbed, unless such injuries were caused by reckless, wanton or intentional negligence." And further on the court said: "While a person intending to take a train, awaiting its arrival, should not be regarded as a trespasser, if he merely cross or inadvertently step on the track in the dark, at or about the usual stopping place; yet, plaintiff, having walked up the track beyond the limits of the usual stopping place, to meet the train, and having knowingly and voluntarily stepped and stood on the cross-ties, where he was not invited, and had no right to be, must be regarded as a quasi trespasser, or as we have said, was guilty of negligence contributory to his own injury."

Applying the principles involved in the foregoing cases, we are of the opinion that the place where the plaintiff in this case was injured, under the facts so far considered, being at a culvert 235 yards up the main line of track from the depot, was not within the limits of defendant's depot grounds, or approaches, "reasonably near" to the depot, to which the general invitation implied by law, and the duty imposed thereby, as stated in Montgomery & Eufaula Ry. Co. v. Thompson, *supra*, attaches; and that there was nothing in the appearance of things in and around the depot, as the plaintiff stepped out of the door into the darkness of the night, just before this misfortune came upon him, which could reasonably have led him to believe that the railroad company held out or designed its main line of track as an approach to or pathway of egress from its depot, or, for that matter, as a passageway to be used by its passengers who might wish to go to a hotel in which the railroad had no interest and which was some 250 yards from its depot. It was very dark and the plaintiff could not see 235 yards up the track; he could not even see the culvert when

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he arrived at it; he could not have seen the steps referred to, and so he could not imply an invitation from the appearance of the pathway which he chose to follow. He had never been that way before, and the evidence does not show that he ever had any knowledge of, or acted upon any previous custom on the part of the passengers to go to the hotel that way. In fact, his testimony induces the belief that he did not have any such knowledge. So that, even if the evidence of common use by passengers of the way taken by plaintiff, raised any implication of invitation by the company, it cannot be said, under the facts in evidence, that this invitation ever reached the plaintiff, or that he acted upon such unknown invitation; and therefore there was no casual connection between the unknown alleged implied invitation and the injury sustained. One acting upon an invitation, express or implied, has the right to presume from knowledge of that fact that the premises he is invited to use are kept at least reasonably safe, and he is not required to be careful to keep on the lookout for pitfalls. *Watson v. E. T. V. & G. Ry.*, 92 Ala. 325, 8 South. 770. But one who acts without knowledge of the invitation would ordinarily be negligent in presuming safety in premises of the nature and condition of which he was ignorant, especially at night. A reasonably prudent man would exercise more care in using premises where he was ignorant of any invitation to use them than he would if he knew or had good reason to believe he was invited to use them, especially if it were dark and he was not therefore familiar with them.

We now come to inquire whether, under the facts in evidence, without regard to the general duty to keep its depot grounds in safe condition, the defendant had impliedly invited its passengers leaving its trains, at Epes, at and before the time of plaintiff's injury, to use this pathway taken by plaintiff, leading as it did beyond the limits of the depot grounds as hereinabove defined, along the track for some 250 yards to some five or six steps up the side of the cut and then on a little further to the hotel. In support of their contention in this connection, counsel for appellee rely mainly upon the proof of years of usage of this way by passengers leaving the depot for the hotel, and those going from hotel to depot, without any objection by defendant, and, it might be inferred from the evidence, with defendant's knowledge; and, further, the fact that the steps up from the cut, when removed several years before by the section foreman, were replaced by the railroad's supervisor. It is also urged that this path was on defendant's property and was generally used as the most convenient route, by passengers, in leaving its depot premises to go to the hotel. The fact that the culvert crossing beneath the track was uncovered and unlighted, and was dangerous to pedestrians using the track, especially at night, is patent and uncontradicted.

"The term 'invitation,' within the rule that the owner of the

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property who has held out any invitation, allurements, or inducements for others to come upon the property, must keep his premises in a safe condition, imports "that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession or control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used." The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability. But if he directly or by implication induces persons to enter on and pass over his premises he thereby assumes an obligation that they are in a safe condition, suitable for use, and for a breach of this obligation he is liable in damages to a person injured thereby." *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. 368, 373, 87 Am. Dec. 644, cited in *L. & N. R. Co. v. Sides*, 129 Ala. 402, 29 South. 798; 4 Words & Phrases, p. 3670. "It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.'" Harlan, J., in *Bennett v. L. & R. R. Co.*, 102 U. S. 276-285, 26 L. Ed. 235.

In the case of *Sturgis v. D., G. H. & M. R. Co.*, 72 Mich. 619, 40 N. W. 914, which is nearly in point, and in which it was held that no invitation was implied, the plaintiff fell into a cattle guard, which crossed under the railroad track. Plaintiff had left the train after dark, was not acquainted with the premises, and instead of going into the depot, which fronted on a highway, on the other side, and without making inquiry, walked along a platform 270 feet long to where it ended with a step down upon the track in the station yard, and then walked up the track in the direction taken by the train which he had left. There were no lights along the track after passing the depot. After walking up the track about 150 yards beyond the platform, plaintiff fell into the cattle guard which had no facilities for crossing. There was a safe way from the front of the depot by the regular highway to the village, which by reason of an angle was further than the straight line along the track to the cattle guard on the highway at the end of the station grounds. The track was leveled and graded. The railroad had all necessary platform accommodations with access to the only highway leading to the town. The track did not differ

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from those usually found on railroad premises and no other means of travel on it appeared than on any such track. The company never took measures to light it or facilitate ingress or egress. The plaintiff urged that the way by the track was very generally used as a shorter cut between depot and village than furnished by the regular road. The court observed: "The travel over it was just such as will be found anywhere along such tracks, which cannot be closed more effectually than by a cattle guard. It is impracticable to keep off trespassers from an open track and all who go upon it do so at their own risk of such dangers as are incident directly to such use. Under all the decisions made in this state on the subject, a company that has provided all reasonable facilities for ingress and egress from its station houses has done its full duty in that regard. No company can be bound to suppose that passengers who do not know the way will neglect the means open to their sight, and go off in the darkness somewhere else. We think no case was made out." See, also, *Hutchinson on Carriers* (3d Ed.) § 937.

In the absence of invitation or license, "it is the settled doctrine in this state, supported by the great weight of authority in England and America, that ordinarily the right of way of a railroad company is its exclusive property. Its free and unobstructed use is essential to the transaction of the business of the company in transporting freight and passengers, and to the safety of its trains. Mere acquiescence in the use of such right of way does not confer on the public a right to use it, nor create any obligation to look out for the persons using it, other than the general duty of lookout for obstructions. In the absence of law, making such acts punishable, railway companies are powerless to prevent such use of their tracks. Under the conditions in which they are situated physical prevention is impracticable, and acquiescence is morally compulsory. Mere acquiescence, under such circumstances, is not permission." *M. & C. R. Co. v. Womack*, 84 Ala. 150, 4 South. 618; *M. & C. R. Co. v. Lyons*, 62 Ala. 74; *Mizell v. S. Ry.*, 132 Ala. 504, 31 South. 86; *S. & W. Ry. Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *Verner v. A. G. S. R. Co.*, 103 Ala. 574, 15 South. 872; *Montgomery's Ex'rs v. A. G. S. R. Co.*, 97 Ala. 305, 12 South. 170.

Applying the principles laid down in the authorities to the facts of this case, we do not think the plaintiff discharged the burden of proving invitation on the part of the defendant company. Mere acquiescence in the use of the track, for that distance beyond its depot, even by passengers, going to the hotel, is not enough to remove the case from the realm of mere license—the company having furnished open, free and safe exit to the highway, and there being no general duty resting upon the carrier to construct or maintain a safe passageway for its passengers to and from any particular hotel, unless under exceptional circumstances, such

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as eating houses where the trains are stopped for passengers to get meals, or hotels in which the carrier is interested, or where situated within, or adjoining, depots or depot grounds. But, generally speaking, it is no part of a carrier's duty to see a passenger safely landed at his hotel. When he has been furnished safe and sufficient egress from the depot grounds, the relation of carrier and passenger ceases.

It was not shown that the railroad company constructed the steps in question; its servants merely took them down and replaced them, and the company impliedly acquiesced in the same use afterward that had existed before. Steps up the side of a shallow cut 250 yards from depot could furnish no visual invitation to use a pathway commencing at the depot.

It is not necessary to extend this opinion by considering the numerous assignments of error separately. The court below erred in refusing the general charge requested in favor of the defendant, as well as the motion for a new trial.

Reversed and remanded.

TYSON, C. J., and ANDERSON and DENSON, JJ., concur.

SAMPLE v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Illinois, April 23, 1908.)

[84 N. E. Rep. 643.]

Railroads—Defective Crossings—Injuries—Negligence.*—Plaintiff's intestate was killed by being thrown from a wagon, owing to a defect in defendant's railroad crossing. There had been planks next to the rails, which were worn out, and the crossing was filled with cinders. There was no plank on one side of one of the rails, and there was a hole on that side of the crossing, of which defendant had been notified, 2 feet wide, 3 feet long, and from 14 to 18 inches deep, which had existed from 6 to 8 months, into which the wheel of the plaintiff's wagon dropped as he was driving over the crossing. Held, that defendant was negligent in permitting such defect to remain, and that the defect was the proximate cause of intestate's death.

Same—Contributory Negligence.—Intestate was not negligent as a matter of law because he attempted to turn on the crossing and did not approach the crossing at right angles, as he was entitled to cross it in any direction he saw fit, provided he used ordinary care in doing so.

*For the authorities in this series on the subject of the duty of railroads to construct and maintain crossings, see *State v. Northern Pac. Ry. Co.* (Minn.), 21 R. R. R. 337, 44 Am. & Eng. R. Cas., N. S., 337.

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Evidence—Photographs.†—In an action for death of the driver of a team by a defect in a railroad crossing, photographs of the crossing, taken while the conditions remained unchanged, were admissible.

Same—Subsequent Repairs.—Where in an action for death by an alleged defect in a railroad crossing, photographs of the crossing were introduced in evidence, proof that the defect was filled up after the accident was admissible to disprove the correctness of the photographs.

Appeal—Variance—Questions Not Raised at Trial.—A question of variance cannot be raised for the first time on appeal.

Same — Assignments of Error — Sufficiency.—A general objection that the trial court erred in giving and refusing instructions, without pointing out in what the error or imperfection in the instructions given consisted, or showing the correctness or the application to the evidence of the instructions refused, will not be considered on appeal.

Railroads—Crossings—Duty of Railroad Company.‡—A railroad company must make a street crossing of such width as to make it suitable and sufficient for the purpose for which it is intended, which depends on the reasonable demands of the traveling public, the extent the crossing is used, etc.

Appeal from Appellate Court, Third District, on Appeal from City Court of Litchfield; Paul McWilliams, Judge.

Action by Sarah C. Sample against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff affirmed by the Appellate Court, and defendant appeals. Affirmed.

Creighton & Gasaway (Chester M. Dawes, of Counsel), for appellant.

Harry C. Stuttle, L. V. Hill, and Amos Olcer, for appellee.

CARTWRIGHT, J. Cummings street, in the city of Litchfield, runs east and west, and is crossed by 4 tracks of the appellant, the Chicago, Burlington & Quincy Railroad Company. The east track is the main track, and the west track, about 75 feet distant, is a Y-track connecting appellant's railroad with another railroad. Between these tracks are two switch tracks leading into glassworks south of and adjoining the street. On October 4, 1905, Henry L. Sample, a teamster, was hauling cinders from the glassworks, and after loading his wagon drove out of the glassworks into the street on the west switch track. He drove along on the switch track to the main traveled part of the street, where the appellant had provided a crossing over its tracks. When the team

†See last foot-note appended to *Louisville & N. R. Co. v. Brown* (Ky.), 27 R. R. R. 426, 50 Am. & Eng. R. Cas., N. S., 426; second foot-note appended to *Chicago, etc., R. Co. v. Crose* (Ill.), 20 R. R. R. 512, 43 Am. & Eng. R. Cas., N. S., 512.

‡See extensive note, 23 R. R. R. 460, 46 Am. & Eng. R. Cas., N. S., 460.

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came upon the crossing he turned east to drive along the street. On the east side of the track there was a chuck hole, into which the right front wheel dropped, throwing Sample off from the wagon and killing him. He left the appellee, his widow, and three children. The appellee, as administratrix of his estate, brought this suit in the city court of the city of Litchfield to recover damages for his death, and charged appellant with negligence in permitting the existence of the hole in the crossing. The plea was the general issue, and the jury returned a verdict for \$5,000. The plaintiff remitted \$1,500 from the damages assessed by the jury, and the court, after overruling motions for a new trial and in arrest of judgment, entered judgment for \$3,500 and costs. An appeal was taken to the Appellate Court for the Third District, and that court affirmed the judgment, and this further appeal was prosecuted.

The defendant asked the court to direct a verdict of not guilty, which the court refused to do, and the refusal is assigned for error. The evidence for the plaintiff was that the crossing was from 14 to 16 feet wide; that there had been some planks next the rails which were worn out and the crossing was filled with cinders; that there was no plank on the east side of the east rail; that there was a hole on the east side of the crossing about 2 feet wide, 3 feet long, and from 14 to 18 inches deep; that the hole had been there from 6 to 8 months; that the superintendent of streets of the city of Litchfield had informed the section foreman of the defendant of its condition, and that Sample, who was standing on his load, was thrown to the ground by the wheel dropping into that hole. There could be no doubt whatever of the culpable negligence of the defendant with respect to the crossing, either from this testimony or from any evidence in the case, nor that the hole was the proximate cause of the death of Sample. The argument that the court ought to have directed a verdict is on the ground that Sample himself was guilty of negligence as a matter of law, and is based solely on the fact that he did not approach the crossing at right angles, but came upon it from along the switch track and attempted to turn upon the crossing. The statutory duty is to construct and maintain crossings so that at all times they shall be safe as to persons and property, and it is plain that this crossing was a dangerous one even for teams crossing it at right angles. Sample, however, had the right to cross it in any direction he saw fit—lengthwise, crosswise, or in any other way—provided he used ordinary care in doing so. It is immaterial where he came from or what he did before he reached the crossing, and when he came upon it he had a right to a safe crossing and to turn as he attempted to do, to drive along the street. The court could only take the issues of fact from the jury in case the averment of reasonable care on his part was unsupported by any evidence, and that averment was not only supported by evi-

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dence but there was no evidence tending to provide the contrary. The court did not err in refusing to direct a verdict.

Complaint is made of the admission of evidence on the part of the plaintiff that the hole was filled up after the accident. The evidence would not have been competent for the purpose of proving an implied admission of negligence by the defendant (*Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724), but it was competent for the purpose of disproving the correctness of a photograph of the crossing. The controversy related to the condition of the crossing at the time of the accident, and photographs are admissible in such cases where the conditions have not been changed. *Lake Erie & Western Railroad Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573; *Chicago & Alton Railroad Co. v. Corson*, 198 Ill. 98, 64 N. E. 739. Under that rule defendant produced and offered in evidence a photograph, alleging that it showed the condition of the crossing at the time of the accident, and plaintiff was permitted to prove by a number of witnesses that the photograph was not a true picture of conditions at that time, for the reason that the hole had been filled up.

It is next contended that there was a variance between the plaintiff's declaration and the proof in this respect: The declaration in the first count charged that Sample was in the act of driving over and across the crossing, and the second, that after arriving at the crossing he was attempting to cross the same, while the proof showed that he drove upon the crossing longitudinally and then turned to the east upon it. That question was not raised on the trial nor mentioned in the written motion for a new trial, in which the defendant was bound to set forth all the grounds of the motion. That question cannot be raised for the first time on appeal. *Alford v. Dannenberg*, 177 Ill. 331, 52 N. E. 485.

Counsel also say that the court erred in giving instructions numbered 1 to 7, inclusive, at the request of the plaintiff, and also erred in refusing to give instructions numbered 9 to 18, inclusive, as requested by the defendant, but they do not point out any ground of objection to the instructions given nor any reason why the refusal of the others was wrong. A general objection that the trial court erred in giving and refusing instructions, without pointing out in what the error or imperfection in the instructions given consisted or showing the correctness and the application to the evidence of the instructions refused, does not require consideration by the court. Counsel on the other side have a right to be informed of the grounds upon which it is claimed that the court erred and to be heard in reply, and we are entitled to the aid of argument on both sides. Counsel have no right to present a general objection and ask the court to search for reasons to sustain it or upon which to base a reversal. *Razor v. Razor*, 142 Ill. 375, 31 N. E. 678; *Brewer v. National Union Building Ass'n*, 166 Ill. 221, 46 N. E. 752.

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It is next contended that the defendant was not bound to make a crossing the entire width of the street. The width must be such as to make a crossing suitable and sufficient for the purpose for which it is intended, and that must depend upon the reasonable demands of the traveling public, the extent to which the crossing is used, and other circumstances. *City of Bloomington v. Illinois Central Railroad Co.*, 154 Ill. 539, 39 N. E. 478. That question, however, is not involved in this case. There is no charge in the declaration that the crossing was not wide enough and there was no issue at the trial on that subject. The negligence on which the action was based was the existence of the hole which caused the death of Sample.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

MORRIS v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota, Aug. 7, 1908.)

[117 N. W. Rep. 500.]

Street Railroads—Injuries to Persons on Track—Actions—Evidence—Sufficiency.—In a personal injury action, the evidence considered, and held sufficient to sustain the finding of the jury that the defendant was negligent and that the plaintiff was not guilty of contributory negligence.

Damages—Measure of Damages—Injuries to Person.*—When an injury to a woman results in a miscarriage, she is entitled to recover such damages as will fairly compensate her for the pain and suffering occasioned by the miscarriage, but not for the pain and suffering occasioned by the loss of the child.

Same.—The pain and suffering which the mother would have suffered when the child was born in the natural course of events cannot be deducted from the pain and suffering occasioned by the miscarriage, which resulted from the defendant's negligence.

Same — Excessive Damages — Injuries to Person.—The damages awarded held not so great as to show passion and prejudice on the part of the jury.

(Syllabus by the Court.)

*For the authorities in this series on the question whether there can be recovery, in an action for personal injuries, for the physical and mental suffering of the injured person, see foot-note appended to *St. Louis, etc., Ry. Co. v. Taylor* (Ark.), 27 R. R. R. 738, 50 Am. & Eng. R. Cas., N. S., 738; last foot-note appended to *St. Louis, etc., Ry. Co. v. Leamons* (Ark.), 27 R. R. R. 744, 50 Am. & Eng. R. Cas., N. S., 744; last foot-note appended to *Taylor v. Atlantic Coast Line R. Co.* (S. Car.), 28 R. R. R. 774, 51 Am. & Eng. R. Cas., N. S., 774.

Morris v. St. Paul City Ry. Co

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Action by Gertrude Morris against the St. Paul City Railway Company. Verdict for plaintiff, and from an order denying defendant's motion for a judgment notwithstanding the verdict or a new trial, defendant appeals. Affirmed.

W. R. Duxbury and *W. D. Dwyer*, for appellant.

James R. Hickey, for respondent.

ELLIOTT, J. While crossing the street, the respondent, Gertrude Morris, was struck by one of the appellant's street cars and severely injured. In an action against the railway company, based on the alleged negligence of the company in running its car at an excessive rate of speed without keeping it under control and giving proper signals, she recovered a verdict for \$4,000. The appeal is from an order of the trial court denying the defendant's motion for judgment notwithstanding the verdict or for a new trial.

1. The question of the defendant's negligence was clearly for the jury. The accident occurred at the intersection of Raymond and Langford avenues, in the city of St. Paul. Street cars run on Langford avenue. Mrs. Morris, after making some purchases at a grocery store, on the northeast corner, started in a southeasterly direction diagonally across Langford avenue. When she reached the first car track, the north track, on which cars run towards the west, and before stepping upon it, she turned and looked partly behind her in the direction from which a car would approach on that track. She testified that there was no car then in sight, but that as she stepped upon the north track she saw a car approaching from the west upon the south track. This car was coming on a downgrade at a very high rate of speed and she could not safely pass in front of it. She stopped a moment to allow this east-bound car to pass, and was struck by a car going west on the north track. The crossing was at a place which is approached by the cars from both directions on a downgrade, although the grade is slightly upward a short distance toward Raymond avenue from the east. Langford avenue in this vicinity forms a curve, so that the cars are not visible in either direction for a very long distance. The cars generally run at a high rate of speed. One witness testified that they usually ran at fully 40 miles an hour in the vicinity of the Raymond avenue crossing, except when slowing down for a stop. The defendant's witness testified that the car was approaching at the rate of 15 miles an hour, and that it slowed down as it approached the other car. The plaintiff's witnesses place the speed much higher, although their figures are not very definite. One witness testified that the car which struck Mrs. Morris came down "on a thundering speed on the curve—just went tearing through the streets."

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The serious question is whether Mrs. Morris exercised proper care for her own safety. The rule which makes it the absolute duty of a person approaching a railway crossing to look and listen does not apply to street railway crossings. Whether, under the circumstances, it is the duty of a person to look and listen for the approaching car, is a question of fact and not of law. But, when a person does look, he is bound to see what is clearly visible and be guided by the knowledge thus obtained. Mrs. Morris testified that she looked east just before she stepped upon the track, and that no car was then in sight. The appellant contends that at that time the car which struck her must have been visible, and that the physical facts disprove her testimony that she did not see the car. The witnesses place the distance at which the car would have been visible at from 300 to 500 feet, and at the rate at which the car was coming it would have covered this distance in a very few seconds. There was also some evidence tending to show that the view was somewhat obstructed by posts, trees, and shrubbery. Mrs. Morris testified positively that she looked and did not see the car. Her attention was directed principally to the car which was approaching from the other direction, and, under all these circumstances, it was a question for the jury to determine whether she was guilty of contributory negligence. *Peterson v. Railway Co.*, 90 Minn. 52, 96 N. W. 751; *Fonda v. Railway Co.*, 71 Minn. 439, 74 N. W. 166, 70 Am. St. Rep. 341; *O'Brien v. Street Railway Company*, 98 Minn. 205, 208, 108 N. W. 805.

2. At the time of the accident Mrs. Morris was pregnant, and the injury resulted in a miscarriage. The court instructed the jury that, if the plaintiff was entitled to recover damages, they might consider as an element thereof the mental and physical pain which resulted from the miscarriage, but not the mental anguish and suffering caused by the loss of the child. The defendant asked the court to instruct the jury that "the damages in this case must be limited to such physical pain and suffering as was the direct result of the accident, independent of the question of the condition of pregnancy claimed on the part of the plaintiff," and that, "if you should find from the evidence that the act complained of was negligent, and that the accident resulted in a miscarriage, the damages resulting therefrom must be limited to such damages for such suffering and pain as the plaintiff suffered in addition to what she would have suffered and endured had she carried the child to the full period. If it should appear that there was an increased aggravated mental or physical pain and distress in connection with such miscarriage, in addition to what the mother would have suffered if the child had been born at the proper time, or that her health had been impaired thereby, then she would be entitled to recover for such additional pain and suffering as she endured, in addition to what

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she would have endured as a consequence of her condition. If you find from the evidence that she did not suffer any additional pain from the miscarriage over what she would have suffered, had she borne the child at the expiration of the period at the proper time, then she is not entitled to recover anything for the miscarriage."

The rule of damages for which the appellant contends finds no support in the cases, and is, in our judgment, unsound in principle. It is advanced by Joyce in his work on Damages (section 185), but is not supported by the citations of any authority. *Western Union Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772, and *Bovee v. Town of Danville*, 53 Vt. 183, cited by counsel for appellant, do not hold that a woman who has suffered a miscarriage can recover damages only for the difference in pain and suffering between what she actually suffered and what she probably would have suffered at some time in the future. The Cooper Case was an action against the telegraph company to recover damages alleged to have been caused by the negligent failure to deliver a message summoning a physician to attend a woman in confinement. It was held that there could be a recovery for the increased pain and suffering which resulted to the woman from the absence of the physician. Manifestly no other rule could apply in such a case. The failure to deliver the message and the resulting absence of a physician operated upon an existing condition and thereby increased the pain and suffering. The Bovee Case was an action against the town for damages caused by a defective highway, which resulted in injury to Mrs. Bovee and the premature birth of twin children. We find nothing in the case which sustains the appellant's position. It was held that the plaintiff could not recover for the loss of her offspring, as the grief therefor "involves too much the element of sentiment to be left to the conjectures and caprice of a jury. If, like Rachel, 'she wept for her children and would not be comforted,' a question of continuing damages is presented too delicate to be weighed by any scales which the law has yet invented." It was held that "the plaintiff was entitled to recover all damages which were naturally and legitimately consequent on the negligence of the town. If the violence done her person resulted in a miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no farther. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damages." In *Berger v. Railway Co.*, 95 Minn. 84, 103 N. W. 724, the reference to Joyce on Damages is in general terms and in connection with the

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statement that the damages awarded in that case were properly confined to the personal injuries of the mother, and that there was no attempt to recover for the mental anguish caused by the loss of the child. The court did not intend to affirm the doctrine, advanced by Joyce, that the jury should subtract from the pain and suffering the woman sustained by reason of the miscarriage the pains of childbirth which she was due to suffer at the end of her period of pregnancy. At the time of this accident Mrs. Morris was pregnant, but she was in a natural and normal condition of health. The miscarriage resulted from the negligent act of the appellant, and it should be required to pay the damages which resulted naturally and directly from its negligent acts. The fact that Mrs. Morris would, in the natural course of events, suffer more or less pain and anguish at the birth of her child, cannot be properly taken into consideration. It is too remote, speculative, and uncertain to be taken as a basis for estimating damages. Her possible future suffering has no connection whatever with the suffering which resulted from the negligent act of the appellant. The request for instructions was properly refused.

3. The other assignments of error do not require extended consideration. The evidence as to the physical conditions was not so definite and conclusive as to require the court to give the instruction, as requested, that "the physical facts in this case are such that the plaintiff, having testified that she looked for the car before entering upon the track, must be held to have seen the car, notwithstanding this testimony that she did not see it." The witness Brimmer was allowed, over the objection of the defendant, to state that the expression upon Mrs. Morris' face was that of a person in great pain. The ruling was correct, under the authority of *Isherwood v. Jenkins*, 87 Minn. 388, 92 N. W. 230, and *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121. The evidence of the witness Marshall with reference to the speed at which it had been customary to run the trains in that vicinity was not prejudicial to the defendant. It appeared that shortly before July 17th, when the accident occurred, the time schedule on the road had been changed so as to require the cars to run at a higher rate of speed at that point. Marshall testified that before the change the cars ordinarily ran at from 35 to 40 miles an hour, unless a stop was to be made at the crossing. In reply to a question, the witness stated that he was referring to the time before the change was made; but, as it appeared that the rate was greater after than before the change, the evidence could not possibly have been legally prejudicial.

The other assignments of error have been examined and found without merit. The verdict is large; but, in view of the nature of the injuries and the impossibility of measuring the damages

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in such a case by any exact rule, we cannot say that it is so large as to suggest that it is the result of passion and prejudice on the part of the jury. Verdicts for similar amounts in such cases have been approved and sustained. *Shartle v. Minneapolis*, 17 Minn. 308 (Gil. 284); *Berger v. St. Paul City Ry. Co.*, 95 Minn. 84, 103 N. W. 724; *North Chicago St. Ry. Co. v. Smadraff*, 89 Ill. App. 411, affirmed 189 Ill. 155, 59 N. E. 527.

The order of the trial court is therefore affirmed.

POTTER v. PENNSYLVANIA R. Co.

(Supreme Court of Pennsylvania, May 25, 1908.)

[70 Atl. Rep. 852.]

Railroads—Accident at Crossing—Contributory Negligence.*—

Where a man drove his horse in broad daylight close to a railroad track before stopping to look and listen, and the horse became frightened by an approaching train, and crossed the track in front of the train and was killed, the driver was guilty of contributory negligence, barring a recovery for his death.

*For the authorities in this series on the subject of the contributory negligence of those injured by reason of teams being frightened by trains or cars, see *Louisville & A. R. Co. v. Davis* (Ky.), 23 R. R. R. 328, 46 Am. & Eng. R. Cas., N. S., 328 (right of person driving horses afraid of cars on public highway near crossing to rely on railroad to give statutory signals in approaching crossing); *Alabama Great Southern R. Co. v. Fulton* (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311 (attempting to get out of vehicle after team is frightened, instruction was erroneous, as plaintiff's conduct was to be judged by what men of ordinary prudence would have done); *Kentucky & I. Bridge Co.'s Receivers v. Montgomery* (Ky.), 2 R. R. R. 405, 25 Am. & Eng. R. Cas., N. S., 405 (care required of person using highway part of toll bridge upon which trains are operated); *Hickey v. Rio Grande W. Ry. Co.* (Utah), 20 R. R. R. 318, 43 Am. & Eng. R. Cas., N. S., 318 (certain instruction was properly refused as superfluous and as improperly singling out isolated facts and confining jury's attention to them); *Doran v. Cedar Rapids & M. S. Ry. Co.* (Iowa), 3 R. R. R. 929, 26 Am. & Eng. R. Cas., N. S., 929 (duty of driver of shy team to avoid street upon which there is an electric railway); *Western Ry. v. Cleghorn* (Ala.), 17 R. R. R. 216, 40 Am. & Eng. R. Cas., N. S., 216 (fact that driver of mule did not stop and listen before crossing track did not contribute to the fright of his mule, caused by seeing a mail crane, so as to preclude him from recovering from railroad for injuries resulting from such fright); *Yazoo & M. V. R. Co. v. Eakin* (Miss.), 1 R. R. R. 895, 24 Am. & Eng. R. Cas., N. S., 895 (failure to stop, look, and listen before going under railroad bridge undergoing repairs); *Chesapeake & N. Ry. Co. v. Ogles* (Ky.), 7 R. R. R. 704, 30 Am. & Eng. R. Cas., N. S., 704 (jumping from buggy when horse is frightened by train); *Mitchell v. Union Terminal Ry. Co.* (Iowa), 10 R. R. R. 75, 33 Am. & Eng. R. Cas., N. S., 75 (laying down reins for brief moment was not a violation of ordinance requiring teams to be

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Appeal from Court of Common Pleas, Union County.

Action by Sophia E. Potter against the Pennsylvania Railroad Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Geo. B. Reimensnyder and *Phillip B. Linn*, for appellant.
Andrew A. Leiser, for appellee.

POTTER, J. The reason given by the learned judge of the court below, in entering judgment of compulsory nonsuit in this case fully justified him in refusing to take it off. The accident occurred at a grade crossing over a single-track railroad, in a country district, in broad daylight. The deceased was a mail carrier, upon a rural route, and, whatever may have been the precise circumstances at the time of the accident, it is clear that he drove his horse very close to the line of the railroad before stopping to look and listen, if he did make any stop. Whether the horse came to a full stop or not seems doubtful; at any rate, it was uneasy and was prancing, and as the train approached became so frightened as to be uncontrollable, and, wheeling somewhat to the left, plunged across the track in front of the train which struck the wagon, and killed the occupant. The only inference which can fairly be drawn from the action of the mail

hitched); *Western Ry. v. Cleghorn* (Ala.), 17 R. R. R. 216, 40 Am. & Eng. R. Cas., N. S., 216 (fact that traveler paid no attention to postmaster approaching mail crane with mail bag, whom he should have seen); *Texas Midland R. R. v. Cardwell* (Tex.), 1 R. R. R. 892, 24 Am. & Eng. R. Cas., N. S., 892 (sufficiency of evidence of); *Texas & P. Ry. Co. v. Hamilton* (Tex.), 1 R. R. R. 884, 24 Am. & Eng. R. Cas., N. S., 884 (sufficiency of evidence of and sufficiency of instruction as to); *Stacy v. Haverhill, etc., Ry. Co.* (Mass.), 20 R. R. R. 598, 43 Am. & Eng. R. Cas., N. S., 598 (where owner of horse and vehicle left the team unhitched on street beside street railway, when he knew a car was about due, and remained in a house, where he did not see them, for about ten minutes, he was guilty of contributory negligence barring a right to recover for injuries to them); extensive note. 5 Am. & Eng. R. Cas., N. S., 287, et. seq.; *Miller v. Wellington & P. R. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 557 (attempting to cross in front of locomotive emitting steam); *Missouri, etc., R. Co. v. Jamison* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 442; *Illinois Cent. R. Co. v. Griffin* (Ill.), 17 Am. & Eng. R. Cas., N. S., 767 (of driver was question for jury); *Pyle v. Clark* (Utah), 5 Am. & Eng. R. Cas., N. S., 156 (guest not responsible for driver's negligence); *Alabama, etc., R. Co. v. Roach* (Ala.), 5 Am. & Eng. R. Cas., N. S., 706; *Wherry v. Duluth, M. & N. Ry. Co.* (Minn.), 4 Am. & Eng. R. Cas., N. S., 72 (incurring apparent and imminent danger); *Missouri, etc., Ry. Co. v. Rogers* (Tex.), 8 Am. & Eng. R. Cas., N. S., 141 (injury caused by an endeavor to escape from apparent danger); *Miller v. Wellington & P. R. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 557 (question of law); *Mitchell v. Nashville, etc., Ry. Co.* (Tenn.), 10 Am. & Eng. R. Cas., N. S., 775 (where locomotive whistle was blown beneath bridge).

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carrier in placing his horse so near the track before stopping is that he was positively negligent. He was perfectly familiar with the crossing, as he passed over it daily in the line of his duty. The road was level and he was free to avoid all danger by stopping at a safe distance from the track. It appears from the testimony that another team was just ahead, and the driver of that wagon whipped up and succeeded in getting safely over the track in advance of the train; but the mail carrier evidently concluded at the last moment that he could not do so, and therefore attempted to stop his horse when very close to the track, intending to wait for the passage of the train. Had his horse remained quiet, he would probably have been safe; but as to this he took his own risk. He voluntarily placed himself in a position of danger. "No error in a close calculation of a chance can relieve from the charge of contributory negligence." *Brown v. Traction Co.*, 14 Pa. Super. Ct. 594. Counsel on both sides have analyzed the evidence in this case minutely, and have thoroughly argued the points involved. But the law governing the question is well settled, and we can see nothing in the evidence which would have justified the trial judge in submitting the question of contributory negligence to the jury, and he discharged a manifest duty in assuming the responsibility of pronouncing upon it himself.

There was no error in refusing to take off the nonsuit, and the judgment is affirmed.

NEW YORK CENT. & H. R. R. CO. *v.* PRICE.

(Circuit Court of Appeals, First Circuit, January 15, 1908.)

[159 Fed. Rep. 330.]

Courts—Rules of Decision—"Dictum."—Whenever a question fairly arises in the course of a trial, and there is a distinct decision thereon, the court's ruling in respect thereto can in no sense be regarded as mere "dictum."

Railroads—Fences—State Statutes—Construction.—Rev. Laws Mass. c. 111, § 120, requires railroads to erect and maintain suitable fences on both sides of the entire length of the railroad except at crossings of a public way or any places where the convenient use of the road would be thereby obstructed, that the corporation shall also construct and maintain sufficient barriers where it is necessary and practical to do so to prevent the entrance of cattle on the road, and in case of its neglect shall forfeit not more than \$200 for every month during which the neglect continues, and that the Supreme Judicial Court shall have jurisdiction in equity to compel the corporation to comply with the provisions, and to prohibit the crossing of highways, or the use of

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any land until the provisions are complied with. Held that, since the construction of such section is a local question, a federal court sitting in Massachusetts would accept the construction placed thereon by the Supreme Judicial Court of the state that the duty imposed exists only in favor of adjoining owners and occupants, and therefore imposed no liability for failure to fence against children who might be playing near the right of way, and thoughtlessly run on the tracks and be injured.

Same—Duty to Exclude Trespassers—Children—Fences.*—Where a child ran quickly on defendant's railroad track, and was struck and killed without negligence on the part of the railroad company in the operation of the train, the railroad was not negligent in failing to fence its track to keep the child off its premises and prevent it from becoming a trespasser, there being no duty, in the absence of statute, on the part of the railroad company to build a fence or erect barriers at places other than crossings to exclude persons, whether children or adults, from its tracks.

Same—Statutes—Nature and Effect.—Statutes requiring railroads to fence their tracks are not declaratory of an existing and recognized legal duty, but impose new and further duties essential or important to the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners, such legislation being justified as an exercise of the state's police power.

Aldrich, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Massachusetts.

George L. Mayberry and George P. Furber, for plaintiff in error.

Greenville S. MacFarland (John P. Feecey, on the brief), for defendant in error.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This is a writ of error brought by the railroad company to review the rulings of the Circuit Court in an action of tort. The plaintiff's intestate, a boy 6½ years old, was playing upon an open lot in East Boston. The lot adjoined the defendant's railroad and was unfenced. The boy struck a plaything so that it fell on or near the track, and ran after it upon the defendant's land, where he was struck by a freight train, receiving injuries from which, after conscious suffering, he died in four or five hours. The declaration charged:

"That the defendant negligently failed to maintain a suitable

*See foot-note appended to *Bischof v. Illinois So. Ry. Co.* (Ill.). 28 R. R. R. 797, 51 Am. & Eng. R. Cas., N. S., 797, where all the authorities in this series on the subject, preceding it, are collected or referred to.

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fence along its tracks as required by the laws of Massachusetts. That said railroad tracks at said place ran at grade by a lot of land where were situated the homes of many young children, and where the children were accustomed to play. That the said tracks were in other respects so situated with regard to said land on which children were accustomed to play that the defendant knew, or ought to have known, that they were a source of peculiar danger and inducement to young children in the absence of such a fence as was required by law."

The Massachusetts statute relating to the fencing of railroads is found in Revised Laws of Massachusetts, c. 111, § 120:

"Every railroad corporation shall erect and maintain suitable fences, with convenient bars, gates or openings therein, upon both sides of the entire length of its railroad, except at the crossings of a public way or in places where the convenient use of the road would be thereby obstructed, and except at places where, and so long as, it is specially exempted from the duty of so doing by the board. Such an exemption granted prior to the first day of August in the year eighteen hundred and eighty-two shall not be revoked except upon new proceedings had under the provisions of this section, notice of which shall be given to the corporation interested, and published once in each of three successive weeks in a newspaper published in each county in which the land is situated. The corporation shall also construct and maintain sufficient barriers, where it is necessary and practicable so to do, to prevent the entrance of cattle upon the road. A corporation which unreasonably neglects to comply with the provisions of this and the following section shall, for every such neglect, forfeit not more than two hundred dollars for every month during which the neglect continues; and the Supreme Judicial Court shall have jurisdiction in equity to compel the corporation to comply with such provisions, and, upon such neglect, to restrain and prohibit it from crossing a highway or town way, or from using any land, until such provisions shall have been complied with."

The railroad company, now plaintiff in error, contends that this statute imposed upon the railroad company no duty to the plaintiff's intestate, and that such duty as is imposed upon the railroad company exists only in favor of adjoining owners and occupants. It relies upon *Byrnes v. Boston & Maine Railroad*, 181 Mass. 322, 324, 63 N. E. 897, 898, in which it was said:

"But the omission to fence does not render a railroad liable except as against adjoining owners; and if a horse escapes from the highway on to an unfenced lot, and thence to the railroad where it is injured, the owner cannot recover unless there was reckless or wanton misconduct on the part of those in charge of the train." *Maynard v. Boston & Maine Railroad*, 115 Mass.

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458, 15 Am. Rep. 119; *McDonnell v. Pittsfield & North Adams Railroad*, 115 Mass. 564; *Darling v. Boston & Albany Railroad Company*, 121 Mass. 118.

It was also said:

"The object of the statute is expressed to be to 'prevent the entrance of cattle upon the road,' and cases that have arisen under it are all cases of this kind."

The plaintiff in error also cites *Morrissey v. Eastern Railroad Company*, 126 Mass. 377, 30 Am. Rep. 686; *Sullivan v. Boston & Albany Railroad Company*, 156 Mass. 378, 31 N. E. 128; *Gay v. Essex Electric Street Railway Company*, 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448, 38 Am. St. Rep. 415; *Daniels v. New York & New England Railroad Company*, 154 Mass. 340, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; *Dalin v. Worcester Consolidated Street Railway Company*, 188 Mass. 344, 74 N. E. 597.

We cannot escape the force of the case of *Byrnes v. Boston & Maine Railroad*, 181 Mass. 322, 63 N. E. 897, by disregarding as dictum the expression "the omission to fence does not render a railroad company liable except as against adjoining owners." Assuming that the facts were such that no obligation to fence existed under the terms of the Massachusetts statute, and that the case so held, nevertheless, as an additional reason for its decision, the court construed the statute, and held that the obligations imposed by it were solely in favor of adjoining owners.

Decisions of the Supreme Court declare the rule:

"Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum." *Union Pacific Company v. Mason City Company*, 109 U. S. 160, 166, 26 Sup. Ct. 19, 50 L. Ed. 134; *Railroad Companies v. Schutte*, 103 U. S. 118, 26 L. Ed. 327.

In *Smiley v. Kansas*, 196 U. S. 447, 455, 25 Sup. Ct. 289, 290, 49 L. Ed. 546, it was said:

"It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. Louis, Iron Mountain & St. Paul Railway Company v. Paul*, 173 U. S. 404, 408, 19 Sup. Ct. 419, 43 L. Ed. 746; *Missouri, Kansas & Texas Railway Company v. McCann*, 174 U. S. 580, 586, 19 Sup. Ct. 755, 43 L. Ed. 1093; *Tullis v. Lake Erie & Western Railroad Company*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize."

It may be conceded that there is ground for doubt whether

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the construction placed upon this statute by the Massachusetts court is not narrower than its terms require. It would be a reasonable construction to say that fences are required not only for the exclusion of cattle and for the benefit of adjoining owners, but for a notice and signal of danger, and as an obstacle and preventive of harm in urban districts frequented by children. One of the learned justices in *Williams v. Great Western Railway Company*, L. R. 9 Excheq. 157, said of a statute imposing a general duty of this character:

"It is not for us to speculate on what was the precise intention of the Legislature when they required that there should be a gate or stile on a footpath crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment. * * * Then can it be inferred with reasonable probability that the accident occurred by reason of that negligence so as to make that a question for the jury?"

See, also, *Hayes v. Michigan Central Railroad Company*, 111 U. S. 228, 240, 4 Sup. Ct. 369, 28 L. Ed. 410; *Baltimore & Potomac Railroad Company v. Cumberland*, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447; *Atchison, T. & S. F. R. R. Co. v. Reesman*, 60 Fed. 370, 373, 9 C. C. A. 20, 23 L. R. A. 768.

Nevertheless there is a considerable conflict of decision as to the proper construction of statutes of this kind, and there are in other states decisions supporting the views of the Massachusetts court. We find it unnecessary to review these decisions, however, since we are of the opinion that the construction of the Massachusetts statute is a local question upon which we accept the decision of the local court.

The defendant in error also contends that, even if not required by statute to maintain a fence, the defendant below was, upon common-law principles, negligent in failing to do so under the conditions proved in this case. The contention is that, because children were accustomed to play in the vicinity of the railroad tracks, "the defendant was bound to anticipate that children will be children," and to take precautions to prevent them from thoughtlessly running upon its tracks.

We think it doubtful if the testimony in this case was sufficient to show that the lot upon which the boy was playing, and from which he ran upon the tracks, was a playground or a place on which numbers of children were accustomed to play. There was evidence that children in considerable numbers were in the habit of playing on the railroad property and along the tracks; but examination of the record does not show that the testimony was directed to the specific proposition that considerable numbers of children were in the habit of playing on the unfenced lot, and of coming upon the tracks from this lot, so that the railroad company had special reason to regard this unfenced lot as an

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accustomed place of ingress for children thoughtlessly trespassing upon its tracks. Assuming, however, for the present, the sufficiency of the proof to establish the fact that this unfenced lot was a playground from which thoughtless children were in the habit of going upon the tracks, we have still an important question: Did this cast upon the railroad company the legal duty of erecting a fence to exclude such trespassers from its tracks, and does a failure to erect a fence make the railroad company guilty of negligence?

It is conceded by the defendant in error that "the Massachusetts rule appears to be that a railroad owes no duty to a trespasser, even though he be guilty only of a technical trespass, save not to injure him by wanton, willful recklessness."

It is contended, however, that the degree of care which the railroad company must exercise towards trespassers upon its right of way is a question to be settled upon general principles of law, and that this court will apply its own rules and not what may appear to be the Massachusetts rule. But as we view this case, there was no ground for holding that the railroad company was negligent in the operation of the freight train, or in a failure to discover and avoid the child after he came upon the track. The child ran quickly upon the track, and there is no contention that he could have been seen and avoided. The substance of the claim is that the railroad company was negligent in not keeping the child off its premises and preventing it from becoming a trespasser.

The defendant in error has cited no case, nor has any case come to our attention, which holds a railroad company liable for injuries upon the ground that it was its duty, in the absence of a statute, to build a fence or erect barriers, at places other than crossings, to exclude persons, whether children or adults, from its tracks. It may be true that in urban districts there is such danger to children as to justify legislation for their protection, imposing special burdens on railroad corporations, and to justify a court in construing a statute which in general terms requires a fence as intended for the protection of persons as well as cattle. In the absence of legislation, however, there is difficulty in assigning legal grounds for casting upon the railroad company, rather than upon parents or the public, the duty of safeguarding children.

The question of the duty to anticipate the presence of youthful trespassers, and to guard against accident to them, was before the Circuit Court in *McCabe v. American Woolen Co.*, 124 Fed. 283, affirmed by this court 132 Fed. 1006, 65 C. C. A. 59. The defendant was charged with negligence in not fencing a mill trench on its lands, for the reason that children were known to be in the habit of frequenting the banks of the trench. The learned judge observed (page 287 of 124 Fed.):

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"We think, therefore, that this canal was an object of such a character that both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto, as they easily could and ought to have done," and held that the action could not be maintained.

Dangers attend the operation of many other enterprises, and there are many places where the intrusion of a thoughtless child is a possibility. This general subject has received careful consideration from the Honorable Jeremiah Smith, in 11 Harvard Law Review, 349-473, 434-448; and the legal difficulties of charging landowners with greater duties to children than to adults are well set forth in his article on "Liability of Landowners to Children Entering Without Permission."

As we understand the decisions, statutes requiring railroads to fence are not treated as declaratory of an existing and recognized legal duty, but as imposing upon the railroads new and further duties deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. Legislation imposing such duties is justified as an exercise of the police powers of the state. *Minneapolis & St. Louis Railway Company v. Emmons*, 149 U. S. 364, 367, 13 Sup. Ct. 870, 37 L. Ed. 769. The creation of special duties of landowners, additional to those recognized at common law, is a matter for the Legislature in the exercise of its police powers, and not a matter for a jury. The proposition that because a landowner may have grounds for thinking that children may come upon his premises, and run into danger, he is thereby charged with the duty to fence his lands for their exclusion, cannot be regarded either as an established principle of general law to be applied by the federal courts, or as a rule which may or may not be applied at the discretion of a jury of a federal court sitting in a district where the state law is otherwise. To impose upon landowners duties in derogation of ordinary right, there must be the justification of the interests of the public generally, and the discretion is vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Lawton v. Steele*, 152 U. S. 133, 136, 14 Sup. Ct. 499, 38 L. Ed. 385.

In *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, 522, 6 Sup. Ct. 110, 113, 29 L. Ed. 463, it was said of a statute of Missouri requiring railroad corporations to erect fences:

"Authority for enacting it is found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations."

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In *Minneapolis Railway Company v. Beckwith*, 129 U. S. 26, 34, 9 Sup. Ct. 207, 32 L. Ed. 585, it was observed by Mr. Justice Field:

"It is true that, by the common law, the owner of land was not compelled to inclose it, so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway, the common law as to inclosing one's land having been established long before railways were known."

Apparently the Massachusetts court has taken the view that the duty does not exist under the principles of common law, and exists only so far as it is imposed by statute, and to those persons who are within the purview of the statute. The decision of the Supreme Court of Massachusetts in *Morrissey v. Eastern Railroad Company*, 126 Mass. 377, 30 Am. Rep. 686, is closely in point, and adverse to the contention that, independently of statute requirement, the railroad company was negligent in respect to a duty owed plaintiff's intestate. Due weight must be given to this decision of the state court, as well as to the decisions construing the statute of Massachusetts.

In *Berlin Mills Co. v. Croteau*, 88 Fed. 860, 32 C. C. A. 126, this court referred to the "broad and indefinite general proposition that, so far as there exist reasonable grounds for apprehending danger, a corresponding duty arises to take precautions," saying:

"The cases furnish much more specific rules to aid owners to understand their obligations. These specific rules are not inconsistent with, but are narrower than, that broad proposition."

The only principle of general law, so called, upon which the plaintiff relies, is the indefinite rule above referred to; but the decisions of Massachusetts courts upon the question before us furnish much more specific rules for the guidance of owners of land situated in Massachusetts. Cases may be conceived, of course, where it would be gross and wanton negligence for a railroad company to run its trains in the ordinary way, when its servants had knowledge that persons would probably be upon its tracks and would be injured; but the case before us is not of that character. The negligence charged is the failure to erect a fence to provide against a possible accident through the thoughtless act of a child in coming suddenly upon its tracks.

The opinion in *McCabe v. American Woolen Co.* shows that the decisions of the Supreme Court in *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and *Union Pacific Railway Company v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, relate to cases which on many grounds are distinguishable from the case before us. Furthermore, the element of "inducement" or "attraction" is entirely absent in this case.

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As it is practically conceded that, under the Massachusetts decisions, the plaintiff could not recover, and as it has not been made to appear that the Massachusetts cases are inconsistent with any rule of the common law or of general law, or with the general trend of authority, we find no reason for applying in this case rules of law different from those applied by the state court. For the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement with the state courts if the question seems to them balanced with doubt. In *Randolph v. Quidnick Company*, 135 U. S. 457, 463, 10 Sup. Ct. 655, 657, 34 L. Ed. 200, it was said:

“As to the construction of a state statute, we generally follow the rulings of the highest court of the state, *Bacon v. Northwestern Life Insurance Co.*, 131 U. S. 258, 9 Sup. Ct. 787, 33 L. Ed. 128, and cases cited in opinion; and, as to other matters, we lean towards an agreement of views with the state courts, *Burgess v. Seligman*, 107 U. S. 20, 34, 2 Sup. Ct. 10, 27 L. Ed. 359.”

See, also, *Clark v. Bever*, 139 U. S. 96, 117, 11 Sup. Ct. 468, 35 L. Ed. 88.

We are of the opinion that the Circuit Court erred in refusing to instruct the jury as requested by the defendant:

“Upon all the evidence in this case, the plaintiff is not entitled to recover upon the first count in the declaration.”

The judgment of the Circuit Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers its costs in this court.

STAPLES v. BOSTON & M. R. R.

(Supreme Court of New Hampshire, Strafford, May 5, 1908.)

[69 Atl. Rep. 890.]

Railroads — Actions for Fire — Evidence — Weight.—In an action against a railroad for fire set by sparks from an engine, the jury, on the testimony of several witnesses that they heard a train in the vicinity of the fire about two hours before the fire, may find that a train passed about two hours before the fire, though train sheets received in evidence indicate that the last train before the fire passed that point some four hours before.

Same.*—Where, in an action against a railroad for fire set by sparks from an engine, the jury might find that the fire which destroyed the property started in the dry grass by the side of the track, and then worked its way up to the building destroyed, the jury might find that the fire was set by sparks from an engine which passed about two hours before the fire, in the absence of any other reasonable explanation of the origin of the fire.

Same.*—The fact that locomotives frequently emit sparks which fall near the track, causing fires, is some evidence that, where the grass or undergrowth near a track is on fire and trains have passed along within an hour or two, the fire was caused by sparks from a locomotive.

Transferred from Superior Court, Strafford County; Wallace, Judge.

Case for loss of property by fire by Jacob F. Staples against the Boston & Maine Railroad. Motions for nonsuit and for the direction of a verdict in favor of defendant were denied, and defendant excepts. Overruled.

Mathews & Stevens, for plaintiff.

Kivel & Hughes, for defendants.

WALKER, J. The principal contention of the defendant is that reasonable men could not find, as claimed by the plaintiff, that a locomotive passed over the track near the plaintiff's buildings about 10 o'clock on the evening of the fire, which occurred about midnight, because the record kept by the defendant of the movement of its trains indicated that the last train over the road be-

*For the authorities in this series on the question whether the fact that a fire was set by a railroad locomotive may be established by circumstantial evidence, see third foot-note appended to *Gracy v. Atlantic Coast Line R. Co.* (Fla.), 26 R. R. R. 508, 49 Am. & Eng. R. Cas., N. S., 508; first foot-note appended to *St. Louis, etc., Ry. Co. v. Dawson* (Ark.), 22 R. R. R. 612, 45 Am. & Eng. R. Cas., N. S., 612; foot-notes appended to *Minard v. West Jersey & S. Ry. Co.* (N. J.), 22 R. R. R. 327, 45 Am. & Eng. R. Cas., N. S., 327.

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fore the fire passed that point some four hours before. In view of the fact that several of the plaintiff's witnesses testified that they heard a train in that vicinity at about 10 o'clock in the evening, the question presented relates merely to the weight to be attached to the evidence. There is no rule of law that makes the train sheets conclusive proof of the movements of trains; and it cannot be said as a matter of law that the jury, upon a consideration of all the evidence, might not reasonably find that a train passed the plaintiff's premises at about 10 o'clock.

There was other evidence that the stubble on the declivity between the track and the end of the barn had been burned; that the fire extended to a pile of boards near the end of the barn, where the fire was first discovered; and that a brisk westerly wind arose about that time, which, fanning the smouldering fire, would naturally cause it to run towards the barn. Finding that the fire which destroyed the plaintiff's buildings started in the dry grass by the side of the track and then worked its way up to the barn, the jury might also find that it was set by a spark from the locomotive which passed by at 10 o'clock, in the absence of any other reasonable explanation of its origin. The fact that locomotives frequently emit sparks which fall near the track causing fires is some evidence that where the grass or undergrowth near a track is on fire, and trains have passed along within an hour or two, the fire was caused by sparks from a locomotive. It is not a mere conjecture, but may be a reasonable inference from the facts proved.

Exceptions overruled. All concurred.

SOUTHERN RY. CO. v. DAVES.

(Supreme Court of Appeals of Virginia, June 11, 1908.)

[61 S. E. Rep: 748.]

Trial—Instructions—Refusal of Requests Covered by Charges Given.—Requested instructions, covered by others given, are properly refused.

Same—Misleading Instructions.—Requested instructions, which are involved and calculated to mislead, are properly refused.

Railroads—Precautions as to Person Seen Near Track.*—It is not

*See foot-note appended to *Duteau v. Seattle Elec. Co.* (Wash.), 26 R. R. R. 140, 49 Am. & Eng. R. Cas., N. S., 140; last foot-note appended to *Norfolk & W. Ry. Co. v. Dean's Adm'x* (Va.), 26 R. R. R. 784, 49 Am. & Eng. R. Cas., N. S., 784; last foot-note appended to *Southern Ry. Co. v. Gullat* (Ala.), 25 R. R. R. 336, 48 Am. & Eng. R. Cas., N. S., 336; *Rouse v. Detroit Elec. Ry.* (Mich.), 10 R. R. R. 58, 33 Am. & Eng. R. Cas., N. S., 58, where all the preceding authorities on the subject in this series are collected or referred to.

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the duty of the engineer of a railroad train to stop when he sees a person approaching the track, but he has the right to assume that the person will not go upon the track in front of a moving train in plain view, unless there is something to show that the person is not going to stop, and the presumption exists in the case of an eight year old child as well as in case of an adult.

Same—Running Train Backwards—Negligence.†—Whether it is negligence to run a locomotive backwards, or push cars ahead of a locomotive, without stationing a lookout on the tender or foremost car to signal its approach to a person on the track, depends upon the circumstances under which the locomotive or train is operated.

Same.†—The failure of a railroad company to have an outlook on the tender of a locomotive while running backward held, under the facts, not to be negligence as a matter of law.

Same—Failure to Ring Bell and Sound Whistle.‡—The failure of those in charge of a train to ring the bell and sound the whistle upon approaching a crossing at which a person is injured by the train is not negligence for which the railroad company is liable, unless the failure is the proximate cause of the injury.

Error to Circuit Court, Mecklenburg County.

Personal injury action by one Daves, by her next friend, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

C. J. Faulkner, for plaintiff in error.

Williams & Tunstall, for defendant in error.

HARRISON, J. On the 19th of February, 1906, an engineer and fireman of the defendant railway company left Lawrenceville, on the main line of the company's road, with an engine and caboose, for Jeffress, on the same line, to get a train of cars standing at

†For the authorities in this series on the subject of the precautions to be observed when kicking, backing, or switching cars at crossings, see foot-note appended to *Chicago, etc., R. Co. v. Walton* (Ind.), 16 R. R. R. 456, 39 Am. & Eng. R. Cas., N. S., 456, where all those preceding it are collected or referred to; foot-note appended to *Bowles v. Chesapeake & O. R. Co.* (W. Va.), 25 R. R. R. 309, 48 Am. & Eng. R. Cas., N. S., 309.

For the authorities in this series on the subject of the duty to maintain lookouts on trains approaching crossings, see foot-note appended to *Louisville & N. R. Co. v. Dick* (Ky.), 12 R. R. R. 314, 35 Am. & Eng. R. Cas., N. S., 314, where all those preceding it are collected; last foot-note appended to *Chesapeake & O. Ry. Co. v. Wilson's Adm'r* (Ky.), 27 R. R. R. 238, 50 Am. & Eng. R. Cas., N. S., 238; *Louisville & N. R. Co. v. Taylor's Adm'r* (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228.

‡See first foot-note appended to *Rogers v. Rio Grande W. Ry. Co.* (Utah), 27 R. R. R. 567, 50 Am. & Eng. R. Cas., N. S., 567; foot-note appended to *Butts v. Atlantic & N. C. R. Co.* (N. Car.), 8 R. R. R. 710; 31 Am. & Eng. R. Cas., N. S., 710, where all the authorities on the subject in this series, preceding it, are collected or referred to.

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the latter point. The engine was moving backwards, with the tender in front and the caboose car behind. As the engine approached the public crossing at Union Level, a station on the road, the engineer and fireman saw two negro children, one nearly 8 and the other nearly 10 years of age, about 150 yards from the crossing, and running rapidly in that direction. The children were not again seen by those in charge of the engine until within a few feet of the crossing, when they were discovered springing on the track immediately in front of the moving engine. The older child succeeded in clearing the track, but the younger was caught and severely injured.

This action was brought by the injured child, suing by her father and next friend, to recover damages for the injuries sustained by her, which it is alleged were inflicted through the negligence of the defendant railway company. The trial in the circuit court resulted in a verdict and judgment in favor of the plaintiff, and thereupon this writ of error was awarded the defendant company.

The defendant asked for five instructions, all of which were refused. Of these instructions, Nos. 1, 2, and 3 were properly refused, because the propositions of law sought to be thereby announced were fully covered by the instructions given for the plaintiff. Instruction No. 5 was also properly refused, because it was involved and the meaning so obscure that it was well calculated to confuse and mislead the jury.

We are of opinion that it was error to refuse instruction No. 4 asked for by the defendant.

That instruction was as follows: "The court instructs the jury that it is not the duty of the engineer of a railroad train to stop when he sees a person approaching the track. He has the right to assume that the person will stop and not go upon the track in front of a moving train in plain view; and, unless there is something to show the engineer that the person approaching is not going to stop, the engineer owes no duty to stop the train."

It is conceded that this instruction correctly states the law in the case of an adult plaintiff of average intelligence, but it is insisted that it is not the law where the plaintiff is an irresponsible child.

The instruction in question was not dealing with the contributory negligence of the plaintiff. That subject had been fully covered in the instructions given for the plaintiff. Instruction No. 4 was dealing solely with the alleged negligence of the defendant company in approaching the crossing.

In *Shearman & Redfield on Neg.* § 463, it is said: "If the engineer sees persons or teams approaching or waiting to cross the railroad, he is not bound to anticipate that they will attempt to cross in view of the train, and therefore he is not usually re-

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quired to check his speed so much as would be necessary to enable them to cross in front of him."

That a person approaching a railroad crossing will stop and not go upon the railroad track immediately in front of a moving engine in plain view is a presumption that arises in the case of a child eight years old, running along the public road, as well as in the case of an adult, provided there is nothing in the situation to put a reasonably prudent man on his guard to use extraordinary care to avoid a collision. There must be something in the situation or appearance of things to suggest that the child is not going to stop; otherwise the failure of the engineer to stop the train is not negligence. In other words, the railroad company cannot be held liable for the failure of its engineer to anticipate that a person, whether infant or adult, approaching a crossing, is going to step upon the track immediately in front of a moving engine, unless there is something to suggest to the engineer that such person does not intend to remain in a place of safety until the train has passed. If it were the duty of a railroad company to stop its trains whenever it saw children running in the direction of a public crossing, the public service would be reduced to a wholly inadequate degree of efficiency.

In the case at bar, the engineer and fireman both testify that, when the plaintiff was seen by them running along the public road in the direction of the crossing, it never occurred to either of them that her purpose was to attempt to cross the track in advance of the engine; that it was a common thing, an everyday experience, to see children running to a passing train; and that such occurrences never suggested the idea that the children were going to put themselves in a position of danger. After the children were seen the first time, they were not observed again by the engineer and fireman until they were seen jumping on the track not more than four feet in front of the moving engine, when it was too late to do anything to avert the accident.

The plaintiff asked for nine instructions, all of which were given, over the protest of the defendant.

Instruction C, given for the plaintiff, was as follows: "The court instructs the jury that it is the duty of a railroad, when running an engine or train backward, to use special precaution to avoid injury to persons using the public highway crossing the railroad track, such as ringing the bell, sounding the whistle, and having a lookout on the tender, or that portion of the train which is in front, and the failure of said railroad to use such special precaution is such negligence as will render it liable in damages for any injuries inflicted upon any one so using the highway, as aforesaid, unless such person was guilty of contributory negligence."

It has been held by this court that it is the duty of a railroad

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company to have a lookout on the leading car of a train backing over a crossing in a frequented street, and that under such circumstances ringing the bell and sounding the whistle was not sufficient. *Marks v. Petersburg R. Co.*, 88 Va. 1, 13 S. E. 299. The circumstances of the case at bar are wholly different. There was only an engine running backward with nothing in front of the engineer but the tender. The crossing approached was practically in the open country—only three or four houses about the station, with nothing to obstruct the view of the traveler on the highway, or the view of the engineer. A lookout on the tender could only have seen what the engineer saw, the children running toward the track, and it is difficult to understand how such a lookout would have been able to fathom the mind of the children any more readily than the engineer did, and to have anticipated that they intended to rush into a position of peril.

Whether it is negligence or not for the servants of a railroad company to run an engine backwards, or push cars ahead of an engine, without stationing some one on the tender, or foremost car, to signal its approach to a person who may be on the track, is a question which is controlled by the circumstances under which the engine or train is operated. Under some circumstances, the act has been held to be negligence as a matter of law; but in most cases it has been held to be a question of fact to be submitted to the jury. 23 Am. & Eng. Ency. of Law, p. 745.

Instruction C tells the jury that it was the duty of the defendant to have a lookout on the tender, and that its failure to take the special precaution of having such lookout was negligence, rendering the company liable in damages to any one injured while using the highway who was not guilty of contributory negligence. This was error. There was nothing in the facts and circumstances to justify the conclusion that as matter of law it was the duty of the defendant to have a lookout on the tender.

This instruction is further erroneous, because it tells the jury that the failure to ring the bell and sound the whistle was negligence for which the defendant was liable. This is not true, unless the jury believed that there was a failure to ring the bell and sound the whistle, and further believed that such failure was the proximate cause of the accident.

Instruction D, given for the plaintiff, is amenable to the same objections pointed out with respect to instruction C, and for similar reasons should have been refused.

The remaining instructions, given for the plaintiff, appear to be without prejudice to the defendant company.

In regular order, the demurrer to the declaration should have been first considered. It is only needful to say that, tested by familiar principles, the declaration sufficiently states a cause of

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action, and the demurrer thereto was therefore properly overruled.

For the error of the circuit court in refusing to give instruction No. 4, asked for by the defendant, and in giving instructions C and D for the plaintiff, the judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted.

Reversed.

KEITH, P., absent.

WEBSTER v. CHICAGO, B. & Q. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, November 27, 1907.)

[158 Fed. Rep. 769.]

Railroads—Highway Crossings—Mutual Rights of Railroad and Public.—By a grant of a right of way to a railroad company, through the exercise of the right of eminent domain or otherwise, to lay its tracks and operate its road across an established highway, the state has necessarily declared that the use of the highway for these purposes is a public use consistent with the other uses to which it is ordinarily subject in favor of the traveling public; neither the public nor the railroad company has the paramount right in such use, but each may use the portion of the highway affected by the grant for all proper purposes subject to proper consideration for the concurrent rights of the other.

Same—Frightening Animals—Removal of Hand Car upon Highway.*—The removal of a hand car from a railroad track upon a highway at a crossing, for a sufficient time to permit the passing of an approaching train, by a section foreman who was using such car in the course of his duty, was a reasonable and permissible use of the highway incidental to the enjoyment by the railroad company of the right to operate its road over the same, and not an invasion of the rights of the general public, and created no liability on the part of the railroad company for the injury of a traveler on the highway whose horse became frightened at the hand car.

In Error to the Circuit Court of the United States for the Western District of Missouri.

*See foot-note appended to *Georgia Ry. & Elec. Co. v. Joiner* (Ga.), 12 R. R. R. 608, 35 Am. & Eng. R. Cas., N. S., 608; foot-note appended to *Davis v. Pennsylvania R. Co.* (Pa.), 27 R. R. R. 210, 50 Am. & Eng. R. Cas., N. S., 210; foot-note appended to *Clinebell v. Chicago, B. & Q. R. Co.* (Neb.), 26 R. R. R. 59, 49 Am. & Eng. R. Cas., N. S., 59.

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J. H. Harkless (W. J. Nelson, Beardsley, Gregory & Kirshner, and Harkless, Crysler & Histed, on the brief), for plaintiff in error.

Hale Holden (O. H. Dean, W. D. McLeod, H. C. Timmonds, James E. Kelby, and J. W. Deweese, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. The record discloses the following brief and undisputed facts: Plaintiff's horse was frightened by a hand car which the section foreman of defendant company had been using in the discharge of his duties, and which he had removed from the rails at a street crossing and temporarily allowed to stand within the limits of the highway, which was also defendant's right of way, while a train running over his section passed. The derailling of the hand car was occasioned by the approach of a train, and no claim is made that it was derailed any too soon to avoid collision. Plaintiff was driving along the highway in the direction of the crossing and reached it just after the hand car had been derailed and just before the train passed. As a result of her horse's fright, she was injured, and subsequently brought this suit in the court below for damages alleged to have been occasioned by defendant's negligence in leaving the hand car on the street and thereby exposing her to danger. It resulted in an instructed verdict in favor of defendant, and this writ of error is prosecuted by plaintiff.

The only question necessary for consideration is whether the Circuit Court erred in directing the verdict. This depends upon whether there was any substantial evidence of negligence in the case. Plaintiff's counsel contend that the highway was for the use of the general public; that it was not a permissible place for conducting the operations of the railway company; that defendant unlawfully obstructed it by derailling the hand car and leaving it there while the train passed by, and is responsible for the natural consequences of its unlawful act; among them, the frightening of horses of ordinary gentleness and the injury resulting therefrom. This contention involves a consideration of the relative rights of a railroad company and the traveling public to the use of that part of the highway which intersects the right of way of the former.

An argument is made in favor of the plaintiff on the assumption that the rights of the railway company in cases like this are subordinate to the rights of the traveling public. Is this assumption correct? By the grant of a right of way to the railway company through the exercise of the right of eminent domain or otherwise to lay its tracks and operate its road across an established highway, the state has necessarily declared that

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the use of the highway for these purposes is a public use consistent with the other uses to which the highway is ordinarily subject in favor of the traveling public. Both the railway company and the public may use the highway for their respective and appropriate purposes. The traveling public, whether driving, riding, or afoot, may use it therefor and for all other necessarily incident purposes. The traveler is not a trespasser when crossing the railway tracks at a public crossing on the highway, but is exercising an undoubted personal right. So, too, the railway company, whether in propelling a train of cars or a hand car over its tracks on the highway, repairing its tracks or doing any other thing requisite and necessary for the proper conduct of its business at that place is not a trespasser, but is exercising its lawful right. Instead of one having a right paramount to the other, the rights of each are of equal dignity as far as they go, and must be enjoyed subject to the embarrassment, if any, which the exercise by the other of his rights creates. Each is entitled to the use of the street for the legitimate purposes of its business, subject always to proper consideration for the concurrent rights of the other.

In *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496, the Supreme Court of Pennsylvania observed concerning the subject now under consideration:

"There is a certain right of property owners, which we will discuss presently, to leave objects on or along a highway, in front of their premises, temporarily, and for special purposes, and where that right exists, it is of equal grade, before the law, with the right of travelers to journey on the highway. * * * As we understand the law there is an absolute right in a property owner to use a portion of the public highway for certain purposes for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the right of the traveling public."

In *Loberg v. Town of Amherst*, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69, which was an action for damages alleged to have accrued to the plaintiff by the fright of his horse occasioned by mortar boxes obstructing the street in front of a residence owned by the defendant, which he had been using for plastering his house, the Supreme Court of Wisconsin observed:

"He" [the owner] "had a right to use temporarily a reasonable portion of the street for the deposit of the mortar boxes, etc., while necessarily used in plastering his house. This right is born of necessity and justified by it. * * * As fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time; and, because building is necessary, materials proper and adapted to that purpose may be placed in the street,

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provided it be done in the most convenient manner; and so, as to the repairing of a house, the public must submit to the inconvenience necessarily incident thereto, but, if prolonged for an unreasonable time, such use of the street becomes unlawful."

In *Golden v. Railway Co.*, 84 Mo. App. 59, the railway company was engaged in repairing a bridge over its tracks. Old boards had been taken out and piled on the side of the highway within a few feet of the traveled track. Plaintiff's horse driven on the highway toward the pile of lumber was frightened by it, and he was injured. The court said:

"We recognize that a public highway or street is not exclusively for travel thereon; that they may be used temporarily, for placing material and for other purposes connected with the adjoining property."

In *District of Columbia v. Moulton*, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237, a steam roller had been employed to keep streets in repair. The court said:

"The use of an appliance such as a steam roller was a necessary means to a lawful end—a means essential to the performance of a duty imposed by law. It must therefore follow that, if in the legitimate and proper use of such machine, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is *damnum absque injuria*."

Judge Dillon in his work on *Municipal Corporations* (4th Ed.) vol. 2, § 730, lays down the general doctrine as follows:

"It is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvement of adjoining lots by digging cellars, by building, etc.; this may occasion a reasonable necessity for using a part of the street or side walk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as, they are reasonably necessary."

To this text, he cites many cases to which reference is called. See, to the same effect, *Jones v. Railroad Co.*, 169 Pa. 333, 32 Atl. 535, 47 Am. St. Rep. 916; *Farrell v. Oldtown*, 69 Me. 72; *Nichols v. Athens*, 66 Me. 402; *Howard v. Union Freight Railroad*, 156 Mass. 159, 30 N. E. 479.

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In view of the principles enunciated above, the question decisive of this case is whether the use of the highway by the section foreman, as and in the circumstances disclosed by the record, is one of the uses incidental to the enjoyment of the conceded right of the railway company to operate its tracks across the highway. If so, it was no invasion of the easement belonging to the general public but only a limitation of it. Hand cars propelled on the tracks of a railroad company afford the usual, customary, and appropriate means for the locomotion of the section foreman in the discharge of his duty over his section of the road. He carries in them his tools and supplies for repairing the road, and they must of necessity be removed from the tracks whenever and wherever a train approaches them. It follows from these facts, in our opinion, that the right of lodgment of the hand car whenever occasion requires its removal is necessarily implied in the grant to operate a railroad, and is a necessary incident to the enjoyment of the grant. Such being the case, when that lodgment is reasonably required to be made and is made on the highway it is not an unlawful obstruction, and does not ipso facto confer a right of action upon one whose horse is frightened by it. On the contrary, it is a consistent and permissible use of the highway for a time reasonably sufficient to enable the train to pass and the operator to restore the hand car to the tracks. The record makes it very clear that the hand car in question was not removed until common prudence demanded its removal. The train was in sight, and the highway then just reached by the section foreman operating the hand car, presented a level and convenient place to derail it. Indeed, there is no evidence that any other place in the near proximity was as suitable or convenient for that purpose as it, and there is no evidence that the foreman did not exercise reasonable care in derailing it, provided he had a lawful right to do so at that time and place. The case of *Ohio & Mississippi Ry. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64, relied on by plaintiff's counsel, does not disclose that the hand car involved in that case was left on the highway for any purpose incidental to the defendant's business. It is true the Supreme Court of Indiana said:

"The right of using a highway for the storage of cars, or even as a place for the temporary deposit of cars, is not possessed by any railroad company."

But it immediately added:

"Possibly an emergency might arise excusing, or justifying, the temporary use of a highway for such a purpose. * * * The act of the appellant in placing the hand car on the highway was, in this instance, unlawful, and calls for an explanation from the authors of the wrong. We find no satisfactory explanation nor any reasonable excuse in the facts exhibited by the answers to special interrogatories."

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We cannot doubt that if the emergency which confronted the section foreman in this case had appeared to the Supreme Court of Indiana it would have regarded it as an emergency which justified a reasonably brief obstruction of the street. In *Railway Co. v. Bridges*, 16 Tex. Civ. App. 64, 40 S. W. 536, also relied on by plaintiff's counsel, there is no showing that the hand car was deposited in the highway in the line of business or because of any pressing emergency. On the contrary, the language of the court excludes that possibility. It said:

"The use of the track by the appellant in no way required that the hand car should be thus operated."

Railway Co. v. Williams, 56 Kan. 333, 43 Pac. 246, is also a case which sanctions the obstruction of a highway by a railroad company for a necessary and reasonable purpose.

Without particularly referring to any of the other numerous cases which the industry of counsel has brought to our attention, it suffices to say that we find in none of them any doctrine which militates against that of the cases first cited by us when applied to facts of the kind disclosed by this record.

The vigorous contention of counsel that the case should have been submitted to the jury for its consideration and determination is clearly without merit. There was nothing for a jury to pass on. The controlling facts were undisputed and a question of law only was presented, namely, whether on those facts a legal liability arose against the defendant for plaintiff's injury. The learned trial judge in the exercise of his undoubted function and in the discharge of a duty properly belonging to him held that no such liability arose out of the facts. In doing so, he committed no error and the judgment is accordingly affirmed.

YORK v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, May 4, 1908. On Rehearing, May 23, 1908.)

[110 S. W. Rep. 803.]

Master and Servant—Assumed Risks—Statutory Provisions—Defenses.—Under Act Cong. March 2, 1893, c. 196, §§ 2, 8, 27 Stat. 531, 532 (U. S. Comp. St. 1901, pp. 3174, 3176), requiring railroads to equip cars with automatic couplers, and expressly providing that in case an employee by performing service shall not be deemed to have assumed the risk thereby occasioned, where a brakeman is killed while uncoupling cars not so provided, the question of assumed risk is not in issue.

Same—Contributory Negligence—Question for Jury.—In an action for the death of a brakeman while engaged in uncoupling cars not provided with automatic couplers, as provided by statute, the court cannot say as a matter of law that he was guilty of contributory negligence.

Same—Railroad Tracks—Unblocked Frogs.*—No cause of action in favor of an injured employee can be predicated on the use of unblocked frogs by a railroad company.

Same—Proximate Cause.—Where a brakeman in the performance of his duty is injured while uncoupling cars not provided with automatic couplers, as required by statute, the proximate cause of the injury is the failure to furnish a coupler which would enable him to uncouple cars without going between them.

On Rehearing.

Same.—Injuries to a brakeman while uncoupling cars are the natural and probable consequence of failing to provide automatic couplers.

Same—Contributory Negligence—Brakeman.†—A brakeman is not, as a matter of law, guilty of contributory negligence in walking backwards with the motion of the car, while uncoupling it; the question being one of fact.

Appeal from Circuit Court, Miller County; J. M. Carter, Judge.

Action by A. B. York, as administrator of J. C. York, de-

*See foot-note appended to *Wabash R. Co. v. Kithcart* (C. C. A.), 26 R. R. R. 167, 49 Am. & Eng. R. Cas., N. S., 167.

†See last foot-note appended to *Choctaw, etc., R. Co. v. Thompson* (Ark.), 26 R. R. R. 417, 49 Am. & Eng. R. Cas., N. S., 417; fifth foot-note appended to *Huggins v. Southern Ry. Co.* (Ala.), 24 R. R. R. 518, 47 Am. & Eng. R. Cas., N. S., 518; *Taggart v. Republic Iron & Steel Co.* (C. C. A.), 22 R. R. R. 511, 45 Am. & Eng. R. Cas., N. S., 511.

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ceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment on a directed verdict for defendant, plaintiff appeals. Reversed and remanded.

William H. Arnold, for appellant.

T. M. Mehaffy and *J. E. Williams*, for appellee.

HILL, C. J. J. C. York, a brakeman in the employ of the appellee railroad company, while in the performance of his duties on a freight train running from Memphis, Tenn., to Wynne, Ark., and beyond, met his death while switching cars at Wynne. This is an action by his administrator to recover damages therefor, and at the conclusion of the trial the court directed a verdict for the defendant railroad company, and the administrator has appealed.

These facts were developed: York was sent to uncouple some cars which were making a flying switch, and the lever which worked the coupling from the outside of the cars was out of order and did not work, and he went between the cars to lift the pin with his hand, or else to reach across and get the lever on the other side (the witnesses differ as to which method he adopted). In some way he got the cars uncoupled while in between them, and while recovering his position outside of the cars he got his foot caught in an unblocked frog and was run over; death resulting from his injuries. The record is in some confusion as to exactly where he was when he was caught, but the jury could have found these facts. When the cars parted, York walked along holding to the car, going along with it (the car was moving slowly), and, while so doing, his foot was caught in the frog. He was walking backwards, with the motion of the car, when his foot caught in the frog which was outside of the track that the car was moving upon. He had evidently gotten outside of that track himself, but, while it is not as clear as it should be, yet it may fairly be found that he was not clear of the cars, which extended beyond the tracks, when his foot was caught. It is inferred from the testimony that this frog was between the track upon which the car was moving and a track intersecting it, outside of the track upon which the car was moving. This would put York still between the cars, although outside of the track upon which the cars were moving, when his foot got caught. This view of the evidence harmonizes the apparently inconsistent statements of the eyewitness nearest to York when he was run over. These facts presented a question for the jury. They show a violation of Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174) sections 2 and 8 of which are as follows:

"Sec. 2. (Automatic couplers required on all cars.) That on and after the first day of January, eighteen hundred and ninety-

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eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars."

"Sec. 8. (Employees injured by non-coupling cars, etc., do not assume the risk). That any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

The failure to have a coupling which met the requirements of this act necessitated York going between the cars to uncouple them if he obeyed orders to do so. Had the act of Congress been complied with, he would not have been required to have placed himself in this dangerous position in order to uncouple the cars. The act expressly provides that performing the work, notwithstanding the default of the company, should not be taken as an assumption of the risk. That being true, the question narrows to one of contributory negligence in going between the cars to uncouple them. The court cannot say as a matter of law that he was guilty of contributory negligence in doing so. *C. O. & G. Ry. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83; *Schlemmer v. Railway Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *K. C., M. & B. Ry. Co. v. Flipppo*, 138 Ala. 487, 35 South. 457.

No cause of action can be predicated upon the use of unblocked frogs. That matter has been thoroughly considered by this court in *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283, and *Railway Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83. The proximate cause appears to have been the failure of the company to furnish a coupler which would enable the brakeman to uncouple the cars without going between them. When he, in the performance of his duties, went between them, in order to uncouple them, and his death resulted from his failure to extricate himself from that dangerous position, it matters not whether an unblocked frog, a hole, or rock, or some other obstruction, caused him to fall, the default was in the company failing to equip itself with appliances that would enable him to uncouple the cars without going between them. The court erred in directing a verdict for the defendant.

Reversed and remanded.

On Rehearing.

1. Appellee questions the correctness of the facts stated in the opinion. The court found widely different conclusions drawn from the evidence by opposing counsel, and carefully read over in consultation more than once the evidence upon which the case

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turned, and the facts as stated in the opinion reflected the result of this careful investigation of the record.

2. It is argued that the court erred in declaring the defective coupling to be the proximate cause of the injury. The loss of life and limb in coupling and uncoupling cars with link and pin, and other methods requiring brakemen to go between moving cars, became appalling, and the safety appliance act, quoted in the opinion, represented an awakened national conscience on the subject. It was a recognition of the consequences to be expected to flow from coupling and uncoupling cars by going between them. The dangers incident to this service are common knowledge, and to remedy these dangers the act in question was passed, which intended to relieve brakemen of the necessity of performing these duties by going between the cars, and to require railroad companies engaged in interstate commerce to so equip their cars that this toll in life should not be taken for lack of safety appliances. To make the requirement effective, it was further provided that, should the company be in default in obeying the act, the brakeman would not be held to have assumed the risk, if he continued to perform his duties. If this provision had not been added, the act would have been wholly nugatory, for the brakeman would assume the risk whenever the company failed to equip itself as required by the act. This provision relieves the brakeman of the assumption of the risk so long as he is performing the duty required of him; but this will not relieve him of negligence in contributing to the injury, nor permit him to unnecessarily prolong his stay between the cars. In other words, the act permits no dalliance with danger, but does permit him, without assuming the risk when the company is in default, to couple or uncouple cars by going between them, and an injury received while in the performance of this duty, either in the act of doing it or extricating himself, would be primarily due to the failure of the company to equip itself with automatic couplers, thus rendering necessary the brakeman's presence between moving cars. "It is generally held that, in order to warrant a finding that negligence * * * is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Scheffer v. Railway Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Railway Co. v. Bragg*, 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206; *Ultima Thule Ry. Co. v. Brenton*, 110 S. W. 1037. Just such accidents as the one proved here are the natural and probable consequence of failing to provide automatic couplers, thereby forcing brakemen between moving cars in order to perform their duties.

3. It is also urged that York was guilty of contributory negli-

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gence as a matter of law in walking backwards with the motion of the car. If York remained between the cars longer than was necessary for him to extricate himself after uncoupling them, he would certainly be guilty of contributory negligence, and could not recover; but the court does not so understand the facts. Going backward with the motion of the car might, or might not, have been the best method to have escaped the moving car from his position where he uncoupled. That is a question of fact.

The motion is denied.

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(Supreme Court of Missouri, Division No. 2, May 19, 1908.)

[110 S. W. Rep. 1086.]

Railroads—Railroad Companies—Agents—Authority—Evidence.—

The authority of the foreman of a railroad company's bridge crew to arrange for the employment of one to board the men in cars furnished by the company need not be proven by direct or positive evidence, but may be shown by facts and circumstances.

Same—Injuries to Person in Car—Actions—Evidence.—Where, in an action against a railroad company for injuries to one employed to board its bridge crew, the evidence showed that a third person was foreman of the crew; that the company prepared cars for the crew, one for cooking and eating, and another for sleeping and others for the tools; that the foreman hired and discharged the members of the crew; that he worked under the direction of the company's superintendent of bridges and building, who knew of the employment of cooks for the men, and they worked in the cars furnished; that the company furnished fuel for cooking purposes and permitted the transportation of the necessary provisions from place to place free of charge; that the cars were hauled from place to place as occasion might require according to the directions of the superintendent; that, if the men did not pay their bills, the company would pay them; and that the company on two occasions had paid bills due plaintiff from members of the crew, etc.—it was proper to admit evidence of a conversation between plaintiff and the foreman detailing the arrangement under which plaintiff went to work as cook for the crew, the authority of the third person to make such arrangement being shown.

Master and Servant—Relation.*—One employed by the foreman of

*For the authorities in this series on the question, who are, and are not, the employees of a railroad company, see first foot-note appended to *Beckham v. Meadville, etc., Ry. Co. (Pa.)*, 28 R. R. R. 224, 51 Am. & Eng. R. Cas., N. S., 224; first foot-note appended to *Pugnire v.*

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a bridge crew of a railroad company to board the men in cars furnished by the company under an agreement providing that each man should pay a specified sum per day for board, and, in case any of the men failed to pay, the company would deduct the same from their wages, is in a sense in the service of the company, in that what she was employed to do and was doing was for the convenience of the employees of the company.

Railroads—Injuries to Persons in Cars—Actions—Evidence.—A railroad company furnished cars for its bridge crew. The men boarded in the cars. The company hauled them from place to place. The foreman of the crew employed a cook for the men, and, while the cars were being hauled, she was injured. Held, in an action against the company for her injuries, that evidence of the arrangement of the cars in the train was admissible; the employee charged with the duty of making up trains knowing at the time that the cars constituting the outfit of the bridge crew were attached to the train.

Same.†—In an action against a railroad company for injuries to the cook employed by the foreman of its bridge crew to cook for the men in cars furnished by the company, evidence of the custom of the cook to work while the train hauling the cars was in motion was admissible to show that she was not guilty of negligence in standing up and working while the train was in motion, especially in view of the proof that it was necessary to work while the train was in motion.

Evidence—Opinion Evidence—Competency of Witnesses.‡—One

Oregon Short Line R. Co. (Utah), 27 R. R. R. 660, 50 Am. & Eng. R. Cas., N. S., 60; foot-note appended to *Floody v. Great Northern Ry. Co.* (Minn.), 27 R. R. R. 162, 50 Am. & Eng. R. Cas., N. S., 162; *Russell v. Oregon Short Line R. Co.* (C. C. A.), 26 R. R. R. 601, 49 Am. & Eng. R. Cas., N. S., 601; second foot-note appended to *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629.

†See third foot-note appended to *Birmingham, etc., Co. v. Landrum* (Ala.), 28 R. R. R. 593, 51 Am. & Eng. R. Cas., N. S., 593; last foot-note appended to *Louisville & N. R. Co. v. Taylor's Adm'r* (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228; *Minot v. Boston & M. R. R.* (N. H.), 27 R. R. R. 512, 50 Am. & Eng. R. Cas., N. S., 512; *Chicago & A. R. Co. v. Wilson* (Ill.), 26 R. R. R. 97, 49 Am. & Eng. R. Cas., N. S., 97; *Chicago, etc., Ry. Co. v. Rathmeau* (Ill.), 26 R. R. R. 202, 49 Am. & Eng. R. Cas., N. S., 202; last foot-note appended to *Cederberg v. Minneapolis, etc., Ry. Co.* (Minn.), 23 R. R. R. 98, 46 Am. & Eng. R. Cas., N. S., 98; last foot-note appended to *Bromley v. New York, etc., R. Co.* (Mass.), 23 R. R. R. 11, 46 Am. & Eng. R. Cas., N. S., 11; *Lee v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 375, 45 Am. & Eng. R. Cas., N. S., 375; *Shandrew v. Chicago, etc., Ry. Co.* (C. C. A.), 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588; *Pitcher v. Old Colony St. Ry. Co.* (Mass.), 24 R. R. R. 625, 47 Am. & Eng. R. Cas., N. S., 625; *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56.

‡See foot-note appended to *Goodes v. Lansing & Suburban Traction Co.* (Mich.), 28 R. R. R. 318, 51 Am. & Eng. R. Cas., N. S., 318.

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who testifies that he has had occasion while riding on trains to note the comparative speed of trains, and that he is able to tell approximately how fast a train in which he is riding is going, is competent to testify as to the speed of a train on which he was riding; the fact that he had not timed moving trains only going to the weight of his testimony.

Appeal and Error—Harmless Error—Erroneous Exclusion of Evidence—Subsequent Admission of Evidence.—The error, if any, in excluding the written statement of a party for want of sufficient identification, is rendered harmless, where the court subsequently overruled an objection to an offer to read the statement and then directed the reading of the statement to the jury.

Railroads—Injuries to Persons in Cars—Contributory Negligence—Question for Jury.—One employed to cook for the bridge crew of a railroad company was injured in consequence of the sudden stopping of a freight train hauling the cars furnished by the company to the crew. The evidence showed that she was at the time engaged in the performance of her regular routine duties such as she had been doing for a year or more without accident. Held, that she was not guilty of contributory negligence as a matter of law.

Same.—Where one employed to cook for a bridge crew of a railroad company was injured by the sudden stopping of a freight train hauling cars furnished by the company to the crew in which to eat and to sleep and carry their tools, she must, to recover, show that the stop which occasioned the injury was so sudden and unusual and of such a character as to show negligence on the part of the servants operating the train and to endanger her life, and that to the knowledge of the trainmen she was an occupant of the cook's car attached to the train.

Carriers—Carriage of Passengers—Degree of Care Required.§—A railroad company carrying passengers for hire on its freight trains must exercise the same degree of care as is required in the operation of its regular passenger trains, though the passenger submits himself to the inconvenience and danger necessarily attending that conveyance.

Railroads—Injuries to Persons in Cars—Negligence.—Evidence held to show that a railway company attaching to a freight train cars furnished by it to its bridge crew in which to board the crew negligently operated the train, and thereby injured the person employed to cook for the crew and riding in one of the cars, authorizing a recovery therefor.

§See first foot-note appended to *Southern Ry. Co. v. Burgess* (Ala.), 21 R. R. R. 321, 44 Am. & Eng. R. Cas., N. S., 321; last foot-note appended to *Van Orman v. Lake Shore, etc., Ry. Co.* (Mich.), 28 R. R. R. 747, 51 Am. & Eng. R. Cas., N. S., 747; *Chicago, etc., Ry. Co. v. Ralston* (Kan.), 28 R. R. R. 701, 51 Am. & Eng. R. Cas., N. S., 701.

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Master and Servant—Assumption of Risk—"Assumption."||—The doctrine of assumption of risk pertains, as a general rule, to controversies between masters and servants, though circumstances may arise between other parties when the doctrine may apply, but the defense of assumption of risk is never available unless it rests on contract; the word "assumption" importing a contract or some kindred act of an unconstrained will.

Railroads—Injuries to Person in Car—Assumption of Risk.—One employed by the foreman of a bridge crew of a railroad company to cook for the men in cars furnished by the company for the purpose and paid by the men for the services rendered does not assume the risk of an injury while the cars are hauled by the company from one place to another.

Master and Servant—Assumption of Risk.||—The doctrine of the assumption of risk does not apply when the injury is occasioned by the negligence of defendant.

Railroads—Injuries to Persons on Cars—Duty to Exercise Care.—One employed by the foreman of the bridge crew of a railroad company to board the men in cars furnished by the company for that purpose, under an agreement that the men shall pay a specified sum per day, is, while on one of the cars while the same is being hauled by the company, more than a licensee, though she is not a passenger nor an employee, and the company owes to her the same duty it owes to any employee not engaged in operating the train but riding thereon on the business of the company.

Same—Pleading—Proof.—A petition, in an action against a railroad company for personal injuries, which alleges that defendant, its servants in charge of an engine hauling a freight train, negligently caused the engine to suddenly stop with a violent jerk, thereby throwing plaintiff, riding in a car attached to the train, with great force to the floor, does not authorize a recovery on proof of negligence in the running or switching of the train to which the car was attached.

Trial—Instructions—Ignoring Issues.—An instruction in a personal injury action, which ignores the issue of contributory negligence pleaded and proved, is erroneous.

Negligence—Contributory Negligence—Issues.—Where, in an ac-

|| For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-note appended to *Chicago, etc., Ry. Co. v. Barker* (Ind.), 28 R. R. R. 228, 51 Am. & Eng. R. Cas., N. S., 228; last foot-note appended to *Feneff v. Boston & M. R. R.* (Mass.), 28 R. R. R. 497, 51 Am. & Eng. R. Cas., N. S., 497; second foot-note appended to *Cryder v. Chicago, etc., Ry. Co.* (C. C. A.), 27 R. R. R. 448, 50 Am. & Eng. R. Cas., N. S., 448; foot-note appended to *Williams v. Choctaw, etc., R. Co.* (C. C. A.), 26 R. R. R. 479, 49 Am. & Eng. R. Cas., N. S., 479; foot-note appended to *Barschow v. Lake Shore, etc., Ry. Co.* (Mich.), 26 R. R. R. 430, 49 Am. & Eng. R. Cas., N. S., 430; second foot-note appended to *Illinois Term. R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683, where all those preceding it are collected.

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tion for personal injuries negligently inflicted, defendant not only alleged that plaintiff was guilty of contributory negligence, but adduced proof in support thereof, defendant was in no position to complain of an instruction that the burden of proving contributory negligence was on defendant, though the negligence of plaintiff appeared from her own evidence.

Damages—Personal Injuries—Recovery for Medical Services—Instructions.—In an action for personal injuries, an instruction authorizing a recovery for medical services should limit the recovery to the amount claimed in the petition for such services.

Husband and Wife—Personal Injuries to Wife—Actions—Recovery for Medical Services.—Under Rev. St. 1899, § 4335 (Ann. St. 1906, p. 2378), providing that a married woman shall be deemed a feme sole, etc., a married woman, who alleged and proved in her action for personal injuries that she was compelled to pay out a specified sum for professional services of physicians and nurses and for drugs, is entitled to recover therefor.

Appeal from Circuit Court, Henry County; C. A. Denton, Judge.

Action by Louisa Tinkle against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. F. Parker, W. F. Evans, John H. Lucas, and C. A. Calvird, for appellant.

Johnson & Sea, J. W. Ross, Peyton A. Parks, and W. E. Owen, for respondent.

BURGESS, J. This is an action for damages for personal injuries caused, as alleged, by the negligence and carelessness of the defendant. The case was tried in the circuit court of Henry county, on change of venue from Polk county, the trial resulting in a verdict and judgment for plaintiff in the sum of \$5,000, from which judgment defendant appeals.

The plaintiff, according to the evidence, was employed by one E. H. Hess, foreman of defendant's "bridge gang," to board and cook for the members of said bridge gang, plaintiff to furnish the board and do the cooking for the compensation of 50 cents a day or \$3.50 per week, for each man, it being further agreed between plaintiff and Hess that, in case any of the men failed to pay her for said board, Hess would deduct the money from their wages and send in board bills to the defendant company, and she would receive checks from the company for the amount of the board bills. The evidence showed that plaintiff, in two instances, received checks from the company in payment of arrears for board. The defendant furnished for the use of plaintiff a car in which to do the cooking and for the serving of meals to the bridge gang,

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also a bunk or sleeping car for the use of plaintiff and her husband and the members of the bridge gang. Defendant also furnished coal and fuel for cooking purposes, and transported the necessary provisions from point to point, free of charge. These arrangements were made by and through Hess, the bridge foreman, with the knowledge and approval of G. W. Turner, defendant's superintendent of bridges and construction. Plaintiff was required to prepare three meals a day for the men, at 6:30 in the morning, at noon, and at 6:30 in the evening, and she was expected, and her unvarying practice during the period of one whole year was, to prepare and make ready the meals and clean up, whether the cars were moving or standing still. She had been employed as cook for a full year, and had traveled to various points in Missouri, Arkansas, the Indian Territory, and Texas, and had by reason of her long experience in riding on freight trains become accustomed to the usual and ordinary jarring and jamming incident to the moving and stopping of such trains, and became skilled in the art of balancing and protecting herself from injury while in the performance of her work and duties.

On the night preceding the morning of the accident, which resulted in plaintiff's injuries, the freight train to which the six cars used by the bridge gang were attached ran into the terminal yards of defendant at Monett, Barry county, Mo.; the bridge gang being on the way to Rody, Ark., to do some repair work. The plaintiff was not feeling well, and had her husband and son prepare breakfast for the men at 6:30 o'clock the morning of the accident, and she came into the cook and dining car at the close of the meal. She ate breakfast, and then she and her husband began washing the dishes. While they were so engaged, the train of cars moved out at a speed of eight to twelve miles per hour. The train started smoothly and ran for about a quarter of a mile, when it came to a sudden and violent stop, which produced a violent jar and jam, by reason of which plaintiff was thrown with great force to the floor of the car, and her right thigh bone was broken near the hip joint, rendering her a cripple for life. Her husband was also thrown to the floor, and a number of dishes were precipitated on the floor and broken. The sudden jar also caused a heavy cast-iron range on the car, and which had been fastened down to the floor with heavy wooden cleats, to rear up out of its socket. Plaintiff's son, Ira Tinkle, had hold of the door of the bunk car at the time, and was shaken up, but succeeded in remaining on his feet.

The evidence on the part of the plaintiff differs from that for the defendant as to the rate at which the cars were running and the suddenness of the stop, and particularly as to the latter. Both plaintiff and her son, Ira, testified that in a whole year's experience of riding on freight trains they had never felt or experienced so sudden and violent a shock or jar as the one which threw plain-

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tiff on the floor of the car and caused the injury. J. F. Watson, engineer on the train, testifying for the defendant, stated that there were between 25 and 30 cars in the train; that it was running between six and eight miles an hour; that he stopped the train in the usual way by means of the air brake and locomotive drivers and tenders; that he did not stop it suddenly, but that, as the train was a long one, and there is always more or less "slack" on a train, a person in the last car, in which car plaintiff was, would be likely to receive a shock and be thrown down, if such person was not on his guard. The fireman on the engine, the switch yard foreman, and two switchmen testified for the defendant; their testimony being to the effect that the stop was not more sudden than usual, and that it was made in the usual way. E. H. Hess, foreman of the bridge gang, testifying for the defendant, stated that he was in a car ahead of the cook car at the time the train was stopped, that he was writing at the time, and that he did not notice that the bump was more violent than usual. He also stated that plaintiff told him, after she was hurt, that she had been washing dishes, and was in a hurry putting them away at the time she was thrown down. He further testified that he had told plaintiff several times that she should sit down while the train was switching, as there would be more or less jarring. Plaintiff testified, in rebuttal, denying that Hess had ever told her to sit down whenever the train was switching. Two physicians and surgeons, who had examined plaintiff, testified that she suffered great pain from the injury, that the injury was permanent, and that the injured leg was about an inch and a half shorter than the other and would remain so.

Defendant insists that the court committed error in permitting plaintiff, as a witness in her own behalf, to testify, over defendant's objection: (1) To a conversation had with Hess, the foreman, with reference to her employment as cook, it not being shown, as contended, that Hess had had authority to bind the defendant; (2) that the company had on two occasions paid board bills owing her by the men, it not having been shown that the company had knowledge of any alleged agreement between Hess and plaintiff; (3) as to an arrangement for cars, it not having been shown that the company knew of plaintiff's connection therewith; (4) that no notice was given plaintiff that the cook car was about to be moved.

Whether error was committed in admitting evidence of a conversation between plaintiff and Hess detailing the agreement and understanding under which plaintiff went to work as cook for defendant's bridge gang depends upon whether Hess, in making such agreement, had authority so to do, and that the company was bound thereby. That there was no direct or positive evidence of such authority is quite clear, but the existence of such authority may be proven by facts and circumstances, if sufficient. The

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testimony of the plaintiff, Ira Tinkle, her son, and of H. E. Hook tended to prove that Hess was foreman of defendant's bridge gang; that there were six cars in the outfit, one of which was fitted up and prepared by the defendant company for purposes of cooking and eating, another with bunks for sleeping, and the remaining cars containing the bridge gang's tools and equipment for bridge work: and that Hess hired and discharged the men of the bridge gang and the cooks. Hess testified that he was foreman of the bridge gang; that he worked under the direction of defendant's superintendent of bridges and building; that the latter knew of his employing cooks for the men and having them work in the car; that the company furnished all the cars, including the cooking and dining car, also furnished fuel for cooking purposes, and permitted the transportation of the necessary provisions from place to place free of charge, and such had been the custom since his connection with the company; that the cars constituting the bridge gang outfit were hauled from place to place, as occasion might require, according to his directions; that it was always customary, when any of the men quit work or were discharged, and their board bills were not paid by them, to attach such board bills to the pay roll sent to the company; and that the company paid same. It was also in evidence that the defendant company, on two occasions, had paid the plaintiff board bills owing her by members of the bridge gang who had quit work. All this evidence tends to prove that Hess had authority to hire plaintiff as cook for defendant's bridge gang and to bind the defendant. That the defendant knew that plaintiff was employed as cook for its bridge gang is clearly indicated by the authority vested in Hess, the furnishing and preparation of a car for cooking and eating purposes, and the necessity therefor by reason of the movement of the bridge gang's equipment from place to place over the company's lines for the expeditious performance of its bridge work at points where, without the convenience of cooking and sleeping cars, it would at times be difficult to secure such necessary conveniences and accommodations for its men. In addition to this, as before stated, the company in two instances paid board bills owing to plaintiff by two members of its bridge gang.

Nor do we think that the admission of evidence as to the arrangement of the cars was error, as claimed by defendant, upon the ground that the company knew nothing of plaintiff's connection therewith. Plaintiff was in a sense in the service of the company, in that what she was employed to do and was doing at the time of the injury was for the convenience and sustenance of the employees of the company, so that the men might thereby be able to put in more time at their work than they could if compelled to board elsewhere than on the car. Moreover, Ed Savage, a witness for defendant, who was foreman of the switch engine at

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the time of the injury, and whose duty it was, under the direction of the yardmaster, to make up trains, testified that he knew at the time of the movement of the train that the cars constituting the bridge gang outfit were attached thereto, and that the cook's car was the hindmost or furthest removed from the engine. This witness, although he testified that he did not know plaintiff was in any car, must have known that the cook's car was usually occupied by the cook, knowing the purposes for which that car was used.

Defendant's objection to the action of the court in admitting evidence that plaintiff was not given notice by defendant's servants that the car in which she was at work was about to be moved seems to have been made under a misapprehension, as it appears from the record that all evidence as to notice of starting the train was stricken out, at plaintiff's suggestion, upon the ground that there was no allegation of negligence in starting the train.

There was, we think, no error in permitting Hook, one of the bridge men, and Ira Tinkle to testify to the custom of plaintiff to cook and the crew to eat while the train was in motion; such evidence tending to show that plaintiff was not guilty of negligence in standing up and washing the dishes while the train was in motion. It would have been impracticable, according to the evidence, to stop the train every time it was necessary to prepare and serve the meals and clean the dishes and utensils, and it had been plaintiff's custom to do this work while the train was in motion the same as while standing still. Nor was there error in permitting Ira Tinkle to testify as to the speed of the train just before the stop which resulted in the injury. He testified that he had had occasion while riding upon trains to note the comparative speed of trains, that he was able to tell approximately how fast a train in which he was riding was going, and that this train's speed, immediately before it stopped, was from ten to twelve miles per hour. It is true that this witness did not testify that he had timed moving cars, and his evidence was not, of course, as important as would be that of a person of more experience and better qualified to testify in this regard; but we think he was competent to testify in this case, the weight of his testimony being for the consideration of the jury. *Walsh v. Mo. Pac. Ry. Co.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Aston v. Railroad*, 105 Mo. App. 226, 79 S. W. 999.

Defendant next insists that it sought to secure the written admission of plaintiff as to the accident, and offered her testimony with respect thereto, which consisted of plaintiff's admissions made on cross-examination, and which was, as contended, sufficient to authorize the introduction of the paper, but which was excluded on objection by plaintiff. While it appears from defendant's abstract that defendant offered in evidence the written statement of plaintiff as to the accident, and that it was excluded at

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the time for lack of sufficient identification, the defendant's additional abstract shows that thereafter, when the statement (Exhibit A) was again offered to be read in evidence, and plaintiff's counsel objected thereto, the court overruled the objection and directed that the statement be read to the jury. It follows that there is no merit in this contention.

Defendant next assigns as error the action of the court in refusing to give instruction numbered 1, asked by defendant, that "on the pleadings and the evidence plaintiff cannot recover." This contention is based upon the following propositions: (1) That the plaintiff's own evidence fails to prove such facts as are necessary to a recovery; (2) that on all the evidence in the case the jury should have been required to return a verdict for the defendant. Of these in their order: Plaintiff testified in her own behalf subsequently as follows: "I was standing on the right-hand side of the car, next to the table, washing the dishes, while Mr. Tinkle stood at my side and wiped them, at the time the accident occurred. An engine backed in and coupled onto the cars and pulled us out pretty rapidly, and stopped with a sudden bump, and throwed me down hard onto the floor, with my right hip down, and there was an awful pain in my right hip. Mr. Tinkle undertook to pick me up the best he could. I was hurt so bad I don't hardly know how he did pick me up, but they picked me up and carried me forward." Being asked what kind of a stop the train made at the particular time, she answered: "It was a sudden and violent stop, I called it; just seemed to me like it couldn't have struck any quicker, and just seemed like it knocked me as hard on the floor as it could; seemed like every bone in my hip was broken. We was going pretty lively, and when they stopped they just stopped of a sudden and threw me with such violent force onto the floor." She also testified that Mr. Tinkle was knocked down at the same time, and that she was accustomed to the ordinary jumping and jamming made by freight trains. On cross-examination, she testified that she could not tell how long the train was in motion before it came to a stop; that it started off nicely, but kept getting a little faster, and, when it stopped, it stopped all of a sudden; and that she was washing dishes at the time the train stopped. Being asked why she did not sit down, she answered: "Because I hadn't been notified that they were going to pull us out or do any switching. * * * I didn't know they was going to pull up just a little and then stop." She further testified that they always notified her when they were going to pull out or do any switching, that then she generally did as the trainmen told her, that she was used to any ordinary jam or movement of the train, that she was going about her work and doing as she had done a hundred times before, and that she cooked and did her work while the cars were running in like manner as when standing on the side track.

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Ira Tinkle's testimony, summarized, was as follows: After all had finished breakfast that morning on the car he went to the water car for water. While he was getting the water, the train started in a westerly direction. He ran and caught the bunk car and climbed in, and in a minute or two after the train had run about a quarter of a mile at a good speed, it came to sudden stop. Describing the stop, he said: "It was kind of an unreasonable jar or jam; looked like it came around against the side of the car, and jerked my hold loose from the door. I managed to stay on my feet." In answer to questions propounded to him, he said that he had occasion, while riding on trains, to notice their comparative speed, and could tell approximately, or had "a pretty good idea," how fast trains are running by riding on them. Being asked to tell the rate of speed, if he observed it, at which the train was moving just before the stop, he replied: "I judge it was going between ten and twelve miles an hour. Q. Now, I wish you would describe that stop, as near as you can, with reference to its suddenness. A. Well, all I can tell about this sudden stop—it stopped right there. It was quite a jam or jar. In fact it was the worst one we had on the cars as long as I was on them—mighty unusual. Q. When you got back into the cook's car, in what condition did you find things in the car? A. Well, the stove—we had a big range stove, and it sat flat on the floor, and we had put cleats around the stove to hold it in place, and the stove was reared up out of its socket and was standing up on the heavy cleats, and there was broken dishes on the floor, and I pried the stove back in its place."

H. E. Hook, a witness for plaintiff, testified that he was a member of the bridge gang at the time of and before the accident, that Hess had authority to discharge the cook or the men, and that during all the time he was with the company Hess had charge of the employment of the members of the bridge gang and the cooks. The testimony of this witness with reference to the cooking and serving of meals and the washing of the dishes and utensils by plaintiff while the car was in motion was substantially the same as that of Mrs. Tinkle.

The substance of the evidence for the defendant, as before stated, was that the train was stopped in the usual manner, and that the jar was not greater than usual. The defendant insists that this evidence fails to show any negligence on its part, and that the peremptory instruction asked should therefore have been given. We think we are safe in saying that the facts disclosed by the record would not justify our holding, as a matter of law, that plaintiff was guilty of negligence, and that such negligence contributed to her injury. She was at the time engaged in the performance of her regular routine duties, such as she had been doing for a year or more without accident or injury to her person. In this case, however, to entitle plaintiff to a recovery, she not being

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a passenger for hire, it devolved upon her to show by a preponderance of the evidence that her injury was caused by the negligence of defendant's servants, agents, and employees in charge of said engine and train in causing said train and the cook's car attached thereto, without any notice or warning to plaintiff of their intention so to do, to stop so suddenly as to cause a jerk and shock so violent as to throw plaintiff with great force against the floor of said car, thereby causing the injury, pain, and suffering alleged in the petition. And in this connection it may be said that it is a matter of common knowledge that jolting and jarring are incident to the operation of freight trains, and therefore, to entitle plaintiff to recover, proof was necessary that the stop resulting in the jar and jolt which caused plaintiff's injury was so sudden and unusual and of such a character as to show negligence on the part of defendant's agent and servants in the operation of the train, and to endanger the life or limb of plaintiff, who they knew or should have known was an occupant of the cook's car attached to said train.

The defendant relies upon the case of *Hedrick v. Mo. Pac. Ry. Co.*, 195 Mo. 104, 93 S. W. 268, as decisive of the case at bar; the court in the *Hedrick Case* holding the evidence to be wholly insufficient to justify a recovery. In that case, however, the facts were much more unfavorable to the plaintiff than are the facts disclosed by the record in this case to Mrs. Tinkle. The plaintiff therein was a passenger upon a very long freight train, which was slowly approaching on upgrade, to a place where it was to take on another car. There was no evidence of any negligent act on the part of any of the train crew, except that the plaintiff testified that the train was in a manner stopped when he got up from his seat and started towards the rear end of the car; that then there was a jump, as if caused by a collision, and for a moment or two he did not know what had happened, but when he came to himself he felt that he was injured, and sat down on a seat, at which time the train was perfectly still. He testified that he could not tell whether he had been thrown down or not, but that when he came to himself he was on his feet; that he had traveled a number of times in cabooses attached to freight trains, and on freight trains; and that this jar was the severest he had ever experienced on a freight train—so severe that it upset the water tank in the car and jerked him senseless and injured his neck. On cross-examination, he testified that, when he started to go to the rear end of the caboose, "the train was barely moving. It was not running one mile an hour, not near as fast as a man could walk. The rate of speed was so that a child could walk and get off if it had not been jarred." He was asked whether he was thrown down, and answered: "Well, I do not know whether I was or not. Right there is where I never will be clear. I do not think I went to the floor. I was stunned for a minute or

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two." Asked whether or not he struck his head, neck, or arm against anything in the caboose at that time, he answered: "I think I kind of caught myself on the —against the door casing, or against the door as it swung; the jar was so violent and severe."

In *Wait v. Omaha, Kansas City & Eastern Ry. Co.*, 165 Mo. 612, 65 S. W. 1028, the plaintiff, a passenger on one of the defendant's trains, was told by the station agent at Milan, from whom he had purchased a ticket, that the passenger coach of the freight train upon which he was to take passage would probably not stop at the platform, as it was the custom of the trainmen, when late, to attend to the freight business and then pull out without stopping, and that he had better go up the track some distance to where the passenger coach was standing and get on the car there. He did so, and the train started up with enough speed, as he thought, to indicate that it was off and would not stop. He therefore got out of his seat and stepped into the aisle to pull off his overcoat. The train suddenly stopped, and he was thrown against the seats and badly injured. There was no evidence tending to show any defect in the track, train, or appliances, or any want of skill or care on the part of the trainmen, or that the train was stopped at an unusual place or in an improper manner, or that the shock which caused the plaintiff's fall was not a natural or ordinary incident of a proper stopping of the train. It was held that the trial court properly sustained a demurrer to the evidence; there being no facts proved from which an inference of negligence on the part of the railroad company could be legitimately drawn.

In *Erwin v. K. C., Ft. S. & M. Ry. Co.*, 94 Mo. App. 289, 68 S. W. 88, the case of *Wait v. Railroad*, *supra*, was cited with approval; the court saying: "We think the *Wait Case* a much stronger case than the one in hand, and for reasons stated in that case and stated in this opinion, we think the court erred in overruling defendant's demurrer to the evidence. Wherefore the judgment is reversed." *Guffey v. Hannibal & St. J. Ry. Co.*, 53 Mo. App. 462, is of much the same character as the case last cited.

In *Portuchek v. Wabash Ry. Co.*, 101 Mo. App. 52, 74 S. W. 368, it is held that a passenger traveling on a freight train assumes all extra hazards incident to and inseparably connected with such method of traveling, and, if injury is caused only by the jerk or jolt occasioned by the stopping of the train in the ordinary way, such person is not entitled to recover, citing *Erwin v. Railway*, *supra*; *Wait v. Railroad*, *supra*; *Chicago, etc., R. R. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; *Olds v. N. Y., etc., R. R.*, 172 Mass. 73, 51 N. E. 450.

The authorities all hold that, when a railroad company "carries passengers for hire on its freight trains, it must exercise the same degree of care as is required in the operation of its regular

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passenger trains; the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance." *Wait v. Railroad, supra*, and authorities cited. In the case last cited, as also in the *Hedrick Case*, there is quoted with approval the following from *Railroad v. Arnol, supra*: "Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences or all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all the ordinary inconveniences, delays, and hazards incident to such trains, when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill." But the degree of care required of the railroad company for the safety of its passengers is the same, whether it be a passenger or freight train; such care, or the charge of negligence, being considered in connection with the make-up, purpose, equipment, and management of the different kinds of trains, as before indicated.

In the case at bar it is clear, we think, that the defendant knew that plaintiff was upon its train at the time of the occurrence which caused the injury; that the train was 25 or 30 cars in length, with no brakeman on the rear car; that it started smoothly, but soon attained a speed of from eight to twelve miles an hour, and after it run about a quarter of a mile, and while plaintiff and her husband, as their custom was, were washing the dishes, it suddenly stopped, causing such a violent jar and jam as to throw her down with great force to the floor of the car, breaking her leg bone and crippling her for life, and threw her husband down at the same time; that the sudden stop and jar jerked her son's hold loose from the door of the bunk car, swung him around against the side of the car, and almost threw him down; that it caused a heavy cast-iron cooking range, which had been fastened by cleats to the floor, to rear up out of its socket, and threw dishes on the floor and broke them; and that plaintiff was given no warning that the train was switching or was about to stop. These facts make out a stronger case of negligence against the defendant than was made in either of the cases cited, and, notwithstanding the fact that witnesses for the defendant testified that the stop was made in the usual way and was not more sudden than usual, the case was properly submitted to the jury, as in none of those cases was the jar so severe as in the case in hand.

Defendant also contends that the peremptory instruction ought to have been given for the reason that the alleged injury arose out of a risk assumed by plaintiff. As a general rule, the doc-

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trine of assumption of risk pertains to controversies between masters and servants, though circumstances may arise between parties other than masters and servants when the doctrine may apply; but such defense is never available unless it rest upon contract, "or, if not exclusively on contract, then on an act done so spontaneously by the party against whom the defense is invoked that he was a volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his adversary. * * * The word 'assumption' imports a contract, or some kindred act of an unconstrained will. Whenever a man does anything dangerous, he encounters the risk; but it by no means follows that, legally speaking, he assumes the risk." *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573, 77 S. W. 314. There is nothing disclosed by the record in this case which removes it from the operation of the general rule, or which would justify the conclusion that the plaintiff assumed the risk. Moreover, the doctrine does not apply when the injury is occasioned by the negligence of the defendant.

It is further insisted that the peremptory instruction should have been given in view of the relation of defendant to the plaintiff and its duty to her. Defendant contends: First, that she was not a passenger; second, that she was not an employee, and that the relation of master and servant did not exist; and, third, that she was at most a mere licensee, and might reasonably be considered a trespasser. We do not understand that it is contended that plaintiff was a passenger on the train at the time of the injury. Nor do we think she was. Nor do we think plaintiff was an employee of defendant, for it is evident from the facts disclosed by the record that the relation of master and servant did not exist between them, although the services rendered by plaintiff were in furtherance of defendant's interests. But if not a direct employee of defendant, she was much more than a mere licensee. She was employed for defendant's benefit by defendant's foreman, with defendant's knowledge, and was put to work in the place fitted up and prepared for her by defendant, and there worked for over 12 months. The duties of plaintiff required her to be on her feet, moving around in the car, preparing and serving meals and cleaning up thereafter, whether the cars used by the bridge gang were in motion or not, and the defendant owed her a degree of ordinary care commensurate with her situation and the duties of her employment. And whether plaintiff was on the train as the servant of defendant, or as a licensee, she was at the time of the injury rendering services for the defendant's benefit, though it may not be directly, with its knowledge and consent, and it owed her the same duty it would any employee not engaged in operating the train, but riding therein on the business of the company. *Roddy v. Mo. Pac. Ry. Co.*

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104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333. In *Eason v. S. & E. T. Ry. Co.*, 65 Tex. 577, 57 Am. Rep. 606, it is held, in an action for personal injuries, that if the injured person is not a volunteer, but engaged at the request or with the permission of the railroad's agent in a transaction of interest as well to himself or his master as to the railroad company, he is entitled to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. The court said: "The principle upon which a recovery is allowed is this: The injured person is not a volunteer, but engaged at the request or with the permission of the railway's agents in a transaction of interest as well to himself or his master as to the railroad company, and this entitled him to the same protection against the negligence of the company's servants as if he were at the time attending to his private affairs. Though performing a service beneficial to both, he is doing so in his own behalf, and not as a servant of the company. Their request or acquiescence gives him the right to perform the service. The fact that he acts in his own behalf, however beneficial his labor may be to the company, gives him the right to be protected against the negligence of the company's servants." The same doctrine is announced in *Ryan v. Boiler Works*, 68 Mo. App. 148. See, also, *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288.

Defendant asserts that instruction No. 1 ignores all the issues tendered by the petition and predicates the right of recovery on issues not presented by the pleadings, namely, that defendant contracted that plaintiff might "maintain the boarding car for the bridge gang," and that while engaged, under such contract, if injured by negligence "in the running or switching of one of its trains to which the car of plaintiff was attached," she was entitled to recover. We are inclined to the opinion that the petition sufficiently alleges that plaintiff had contracted with the company, through its agent, Hess, foreman of the bridge gang, to maintain the boarding car and board the bridge gang; but it does not allege that she was injured by the negligence of defendant in the running and switching of the car. The allegation in the petition is that said "defendant, its agents, servants, and employees in charge of said engine, improperly, negligently, and carelessly caused said engine to suddenly stop with a sudden and violent jerk and shock, thereby throwing the plaintiff with great force to the floor," etc. There is a very material difference between the running and switching of a freight train and the stopping of it suddenly, with a violent jerk or shock. If this action were predicated simply upon negligence in the running and switching of the train in this instance, we should not hesitate to say that the plaintiff would not be entitled to recover; but this

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instruction authorizes a verdict upon that theory. The petition alleges a specific act of negligence, and the instruction should be in accord therewith. Besides, the instruction entirely ignores the issue of contributory negligence, which was pleaded in the answer, and which there was some evidence tending to prove. Our conclusion is that said instruction is erroneous and misleading, and that, as instruction No. 3 is bottomed upon that instruction, it is also erroneous.

Defendant complains of the action of the court in giving instruction No. 5, which declares the burden of proving contributory negligence to be on the defendant, not that it is not correct as a proposition of law, but that it ought not to have been given in this case, because the negligence of the plaintiff appeared from her own evidence. But defendant not only alleged in its answer that plaintiff was guilty of contributory negligence, but adduced evidence in support of that defense, and it is in no position to complain of an instruction which its defense invited.

There was, we think, no error in refusing instructions Nos. 2, 3, and 6 asked by defendant.

In instruction No. 9, the court told the jury that the plaintiff was entitled to recover for medical services, without limiting the same to the amount claimed in the petition for such services. Upon retrial, this should be corrected. It is said that this instruction is erroneous by reason of the fact that the liability for medical services rested on the husband, and not on the wife, and that she was not entitled to recover therefor. If, as alleged in the petition, plaintiff, on account of her injuries, and in the endeavor to be healed thereof, was compelled to pay out divers sums of money, to wit, the sum of \$200 for professional services of physicians and nurses and for drugs, then she was entitled to recover therefor. Section 4335, Rev. St. 1899 (Ann. St. 1906, p. 2378).

For the reasons indicated, the judgment should be reversed, and the cause remanded for further trial.

It is so ordered. All concur.

SOUTHERN RY. CO. *v.* MOORE.

(Supreme Court of Appeals of Virginia, June 11, 1908.)

[61 S. E. Rep. 747.]

Master and Servant—Appliances—Duty of Master—Negligence.*—

The master is not a guarantor of the safety of his appliances, his duty being merely to use ordinary care to provide and maintain reasonably safe appliances, and the failure of either the master or one of his servants to whom the duty is delegated, to exercise such degree of care, is actionable negligence.

Negligence—Evidence.†—The mere happening of an accident is of itself no evidence of negligence. There must be affirmative and preponderatory proof of negligence, showing more than the mere probability of a negligent act.

Master and Servant—Railroads—Personal Injuries—Defective Car Coupler—Negligence—Sufficiency of Evidence.—A competent inspector employed by defendant railroad inspected a car and automatic coupler three times within 24 hours. The third inspection showed a defect in the coupler, consisting of the absence of a pin. The inspector at once set about procuring another pin; but, before he returned, plaintiff, a brakeman, attempted, in violation of defendant's rules, to couple the car to another by hand, though he saw the defect, which was obvious, and was injured. Held, that defendant was not guilty of actionable negligence.

Error to Circuit Court, Orange County.

*For the authorities in this series on the subject of the care required of a railroad company, as an employer, to furnish safe appliances, see first foot-note appended to *Cooney v. Commonwealth Ave. St. Ry. Co.* (Mass.), 27 R. R. R. 627, 50 Am. & Eng. R. Cas., N. S., 627; first foot-note appended to *Kentucky, etc., R. Co. v. Morgan* (Ind.), 26 R. R. R. 437, 49 Am. & Eng. R. Cas., N. S., 437; *McDonnell v. New York, etc., R. R.* (Mass.), 25 R. R. R. 525, 48 Am. & Eng. R. Cas., N. S., 525; third foot-note appended to *Southern Ry. Co. v. McGowan* (Ala.), 25 R. R. R. 353, 48 Am. & Eng. R. Cas., N. S., 353; *Clippard v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107.

For the authorities in this series on the subject of the degree of care required of a railroad, as an employer, in inspecting appliances, see first foot-note appended to *Cryder v. Chicago, etc., Ry. Co.* (C. C. A.), 27 R. R. R. 448, 50 Am. & Eng. R. Cas., N. S., 448; first foot-note appended to *Kiley v. Rutland R. Co.* (Vt.), 27 R. R. R. 415, 15 Am. & Eng. R. Cas., N. S., 415; foot-notes appended to *Kentucky, etc., R. Co. v. Morgan* (Ind.), 26 R. R. R. 437, 49 Am. & Eng. R. Cas., N. S., 437; *Clippard v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107.

†See second foot-note appended to *Chicago Union Traction Co. v. Giese* (Ill.), 27 R. R. R. 195, 50 Am. & Eng. R. Cas., N. S., 195, where all the authorities in this series on the subject, preceding it, are collected or referred to.

Southern Ry. Co. v. Moore

Action by Edward Moore against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

John W. Fishburne, for plaintiff in error.

Horsley, Kemp & Easley, for defendant in error.

HARRISON, J. This action was brought by Edward Moore to recover damages of the Southern Railway Company for its alleged negligence in causing him serious injury.

At the time the injury complained of was sustained, the plaintiff was a brakeman in the service of the defendant company, engaged in the act of coupling two freight cars on the siding at Orange. There was a demurrer to the evidence by the defendant company, which was overruled by the circuit court, and judgment entered for the plaintiff. Thereupon this writ of error was awarded.

It appears that two freight cars, equipped with Janney automatic couplers, were standing on the siding at Orange. With a Janney coupler, the locking or coupling pin is connected with a lever which projects from the side of the car. By manipulating this lever, the brakeman couples the cars without the danger of going between them. The connection between the lever and the coupling pin is affected by the use of a small pin. At the time of the accident, this small pin was missing, so that the lever could not be used in coupling the two cars. The defect was seen by the plaintiff. It is shown by the evidence for the plaintiff to have been a defect easily seen and easily repaired. When the plaintiff approached the cars for the purpose of effecting the coupling, with full knowledge that the coupler was out of order, he, in violation of the rules of the company, which were also known to him, went between the cars and undertook to make the coupling with his hand, receiving, in doing so, the injury complained of.

The defendant company based its demurrer to the evidence upon the ground that there was no negligence on the part of the defendant which was the proximate cause of the injury.

The burden was upon the plaintiff to prove that the injury complained of was caused by the negligence of the defendant. If this burden is not sustained with satisfactory proof, there can be no recovery.

The negligence alleged is that the defendant company knowingly and negligently used on one of its cars a defective coupler. It was shown that the coupler in question was not in good working order; the defect consisting in the absence of a small pin which connected the lever, already mentioned, with the coupling pin. The uncontradicted evidence further shows that the car in question had been inspected by a competent inspector for the defendant company on the evening before the accident, and again the

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next morning, and again just before the accident happened, about 4 o'clock in the afternoon. On the first two of these inspections, the small pin was not missing, and the coupling apparatus was in satisfactory condition. On the evening of the accident, when the third inspection was made, the small pin was missing. Upon this discovery, the inspector immediately went to procure another pin with which to remedy the defect; but, when he returned with the pin, he found the plaintiff between the cars performing with his hand the act which resulted in his injury.

The sole question is whether the plaintiff, upon these facts, has sustained the burden of proving actionable negligence on the part of the defendant.

The declaration does not charge negligence in employing incompetent fellow servants, nor does it charge negligence in providing unsafe appliances. The only allegation of negligence is that the defendant allowed one of its appliances to become unsafe.

The master's duty to furnish and maintain safe appliances is not an absolute duty. He cannot be held as a guarantor of the safety of his appliances. His duty is merely to use ordinary care to provide and maintain reasonably safe appliances, and the failure of either the master or one of his servants, to whom the duty is delegated, to exercise this degree of care in performing such duty, is actionable negligence. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. 963.

In the latter case, it is said: "Absolute safety is not attainable, and employers are not insurers of their employees. They are liable for the consequences, not of danger, but of negligence."

In the case at bar, the plaintiff has failed to prove any breach of the defendant's duty to use ordinary care to keep and maintain its cars and appliances in good order. The mere happening of an accident is, of itself, no evidence of negligence. There must be affirmative and preponderating proof of negligence, showing more than the mere probability of a negligent act. *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *N. & W. Ry. Co. v. Johnson*, 103 Va. 787, 50 S. E. 268.

The evidence in the case before us shows that the defendant had employed a competent inspector, whose duty it was to inspect cars at the place where the accident happened. The car and coupler, in connection with which the plaintiff was injured, had been inspected three times within the 24 hours preceding the accident. The first two inspections showed that the small pin was in place, and the coupler in good condition. The third inspection, which was just before the accident, showed that the small pin was missing, having been, in some unexplained way, removed in the interval between the second and the last inspection. The evidence

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further shows that, as soon as the defect was discovered, the inspector at once turned his attention to securing another pin with which to remedy the defect. The plaintiff saw that the coupler was out of order; his own evidence showing that the defect was well-nigh as readily seen "as the drawhead on the box car." A reasonably prudent man could hardly have been expected to use greater care and watchfulness to keep appliances in order than was exercised by the defendant in this case to see that its appliances were in good repair. There is no evidence that the inspector was incompetent, or that he was negligent in the performance of his duties. The evidence wholly fails to show that by the exercise of reasonable care the defendant could have done more than it did to discover the defect, or to remedy the same after it was discovered, or that the defendant failed in the discharge of any duty which proximately caused the injury complained of.

It is contended, with much reason, on behalf of the defendant company, that the plaintiff cannot recover because the injury of which he complains was solely the result of his own negligence. Having, however, reached the conclusion that no actionable negligence has been established on the part of the defendant company, it is unnecessary to consider the negligence of the plaintiff.

For these reasons, the judgment of the circuit court must be reversed, the demurrer to the evidence sustained, and judgment entered here in favor of the defendant company.

Reversed.

KEITH, P., absent.

UNITED STATES v. DENVER & R. G. R. Co.

(Circuit Court of Appeals, Eighth Circuit, August 22, 1908.)

[163 Fed. Rep. 519.]

Railroads—Safety Appliance Acts—Pleading—Complaint to Recover Penalty—Not Necessary to Negative Exception in Proviso or Exercise of Reasonable Care—If One Coupler Be Inoperative and There Be Actual and Substantial Hauling in Interstate Traffic Statute Is Violated.—A complaint under the safety appliance law of Congress to recover a penalty for hauling a car in moving interstate traffic in violation of section 2 (Acts March 2, 1893, c. 196, 27 Stat. 531, and April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3174] amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), relating to automatic couplers, is not demurrable (a) because it fails to negative the matter of the exception created by the proviso to section 6 (27 Stat. 532 [U. S. Comp. St. 1901, p. 3175] amended by 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]); or (b) because

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it only shows that one of the couplers was out of repair and inoperative, and that it was so because the uncoupling chain was "kinked"; or (c) because it fails to negative the exercise of reasonable care on the part of the railway company in maintaining the coupler in operative condition; or (d) because, although showing an actual and substantial hauling of the car in moving interstate traffic, it fails to specify how far the hauling was continued, or is silent in respect of any actual use of the defective coupler.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Colorado.

Ralph Hartzell, Asst. U. S. Atty., *Luther M. Walter*, Special Asst. U. S. Atty. (*Earl M. Cranston*, U. S. Atty., on the brief).

Henry McAllister, Jr. (*Joel F. Vaile* and *Elroy N. Clark*, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILLIPS, District Judge.

VAN DEVANTER, Circuit Judge. The matter here in controversy is the sufficiency of the complaint in a civil action to recover penalties under the safety appliance law of Congress. Act March 2, 1893, c. 196, 27 Stat. 531; Act April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3174) amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). There are four counts in the complaint, each charging a distinct hauling of a car in moving interstate traffic when one of the couplers with which it theretofore had been properly equipped was out of repair and inoperative. In the District Court all the counts were held insufficient upon demurrer. The particular reason for the ruling is not disclosed, but in support of it the defendant makes several objections to the complaint. The first of these is that the plaintiff does not negative the matter of the exception created by the proviso to section 6 of the act of March 2, 1893, as amended by the act of April 1, 1896, which gives the right of action for the penalty. This objection must fail, because it is opposed to the settled rule that an exception created by a proviso or other distinct or substantive clause, whether in the same section or elsewhere, is defensive, and need not be negated by one suing under the general clause. *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538; *Ledbetter v. United States*, 170 U. S. 606, 611, 18 Sup. Ct. 774, 42 L. Ed. 1162; *Schlemmer v. Buffalo, etc., Co.*, 205 U. S. 1, 10, 27 Sup. Ct. 407, 51 L. Ed. 681; *Smith v. United States*, 85 C. C. A. —, 157 Fed. 721, 727; *Id.*, 208 U. S. 618, 28 Sup. Ct. 569, 52 L. Ed. —. The second objection is that there is no allegation of any facts showing that the condition of the coupler was such as to make the hauling of the car unlawful.

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It is also untenable. That statute makes the hauling unlawful if the car be not equipped with "couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars," and the complaint, taking the second count as an illustration, alleges that the hauling occurred "when the coupling and uncoupling apparatus on the 'B' end of said car was out of repair and inoperative, the uncoupling chain being kinked on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled, without the necessity of a man or men going between the ends of the cars." This allegation could be improved in point of directness, but it was evidently intended to mean, and we think it does mean, that the coupler on the "B" end of the car was out of repair, in that the uncoupling chain was kinked, and that, in consequence, that coupler was inoperative in that it would not couple automatically by impact, and could not be uncoupled, without the necessity of a man going between the ends of the cars. If that was so, one of the couplers with which the car was equipped did not meet the requirements of the statute. But it is said that in truth a coupling between such an inoperative coupler and an operative one can be automatically effected by impact, and an uncoupling thereof can also be effected, without the necessity of a man going between the ends of the cars, if he happens to be on that side of the track from which the lever of the operative coupler can be manipulated, or if he crosses to that side by going around, climbing over or crawling under the cars. That this is so has been shown in other cases which have been before this court (*Morris v. Duluth, etc., Ry. Co.*, 47 C. C. A. 661, 108 Fed. 747; *Gilbert v. Burlington, etc., Ry. Co.*, 63 C. C. A. 27, 128 Fed. 529), but, passing the question whether we can here take notice of the fact so asserted and shown, we cannot assent to the contention which is founded upon it, namely, that an inoperative coupler—that is, one which cannot be properly manipulated preparatory to effecting a coupling or an uncoupling, as the case may be, without a man going between the ends of the cars—is yet to be regarded as conforming to the statute, because another coupler capable of being so manipulated can be coupled therewith and uncoupled therefrom, without a man going between the cars, if he submits to whatever of inconvenience or risk may be incident to getting at the lever of the operative coupler. An all-sufficient answer to this contention is that the statute in terms requires that every car to which it applies shall be equipped with "couplers" of a prescribed operative type, and the reasonable attainment of its manifest object renders it necessary that the coupler at each end of the car shall conform to this requirement.

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Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Chicago, etc., Co. v. Voelker, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

The third objection is that there is no allegation of any failure on the part of the defendant to exercise reasonable care in maintaining the coupler in operative condition. It must also fail, because the duty which the statute imposes upon a railroad company, in that regard is not qualified by the common-law rule of reasonable care, but is absolute, as has been recently and authoritatively settled in *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. —. See, also, *United States v. Atchison, Topeka & Santa Fe Ry. Co.* (C. C. A.) 162 Fed. —.

The last objection is that there is no sufficient allegation of a hauling of the car. It must share the fate of the others. The statute inhibits a hauling "in moving interstate traffic," and the complaint, taking the second count as an illustration, alleges that the defendant "hailed over its line of railroad one car, to wit, Pere Marquette 41,948, used in moving interstate traffic to wit, bullion consigned from Murray, in the state of Utah, to ——— New York Harbor, in the state of New York," and "hailed said car, with said interstate traffic, over its line of railroad out of its yards at Minturn, in the state of Colorado, in an easterly direction, when" one of the couplers thereon was out of repair and inoperative, as before stated. The criticism made of this allegation is that it does not specify how far the hauling was continued, or its purpose, and is silent respecting any actual use of the defective coupler; but the answer to this is that the allegation does sufficiently show an actual and substantial hauling in moving interstate traffic, and that, this being so, it is immaterial, under the statute, how far the hauling was continued or whether there was any actual use of the defective coupler.

As the objections made to the complaint are untenable, and as none other is perceived by us, the judgment is reversed with a direction to overrule the demurrer and to take such further proceedings as may be agreeable to law.

BALLARD'S ADM'X v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, May 7, 1908.)

[110 S. W. Rep. 296.]

Master and Servant—Duty to Employ Competent Servants—Acts Done Outside Scope of Employment.*—While a master owes the duty to a servant to exercise ordinary care in selecting competent fellow servants for him, he is not liable where an apprentice in a machine shop, intending to play a prank, took a compressed air hose not committed to his use, but which is a harmless implement when properly employed, and turned it upon a fellow servant, causing his death, though the apprentice had been retained in the employ with knowledge that he was in the habit of turning the hose on other boys as a prank.

Same—Duty to Guard Dangerous Agency.—A compressed air hose used in a machine shop to blow away filings or cuttings is not a dangerous agency which must be guarded by a master to prevent its being used by unfit employees.

Nunn, J., dissenting.

Appeal from Circuit Court, Madison County.

"To be officially reported."

Death action by John Ballard's administratrix against the Louisville & Nashville Railroad Company. Judgment for defendant on demurrer, and plaintiff appeals. Affirmed.

Lewis B. Herrington and Smith & Smith, for appellant.

Benjamin D. Warfield and John T. Shelby, for appellee.

HOBSON, J. Appellant, as administratrix of John Ballard, instituted this action to recover against the Louisville & Nashville Railroad Company for the death of her intestate. The circuit court sustained a demurrer to the petition, and she appeals.

The facts set up in the petition are these: John Ballard was an apprentice in the defendant's machine shop at Corbin, Ky. He was an infant, and had been in the shop only three days. There was another apprentice in the shop whose name was Hodge. While Ballard was engaged in his duties Hodge slipped up behind him with a compressed air hose, and turned the high pressure of air from the hose into Ballard's rectum, the air entering

*See third foot-note appended to *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 28 R. R. R. 558, 51 Am. & Eng. R. Cas., N. S., 558; first foot-note appended to *Blomsness v. Puget Sound Elec. Ry.* (Wash.), 26 R. R. R. 640, 49 Am. & Eng. R. Cas., N. S., 640; *St. Louis, etc., R. Co. v. Wyatt* (Ark.), 26 R. R. R. 646, 49 Am. & Eng. R. Cas., N. S., 646; last foot-note appended to *South Covington, etc., Ry. Co. v. Cleveland* (Ky.), 26 R. R. R. 143, 49 Am. & Eng. R. Cas., N. S., 143.

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his bowels and rupturing them in such a way that he died shortly afterwards. Hodge had been serving his apprenticeship in the shop for about two years. He turned the air hose on Ballard as a prank. The superintendent of the shop, under whom both Hodge and Ballard worked, had knowingly permitted Hodge and the other apprentice boys in the shop to use this hose in a dangerous manner. The defendant knew that the hose was a dangerous appliance. Hodge had been using the compressed air hose in a playful manner while on duty with the defendant for some time prior to Ballard's death. The defendant knew this, and permitted it without warning, restraining, or discharging Hodge. Hodge was a careless, reckless, and stupid boy, and utterly unfit to be working around or handling this dangerous air hose, or dangerous compressed air. The defendant knew this, or could have known it by the exercise of ordinary care. The defendant, knowing of the careless, reckless, and dangerous disposition of Hodge, and knowing of his conduct in connection with the use of the dangerous compressed air, negligently retained him in its employ, and negligently failed to exercise proper and reasonable supervision over his acts and conduct while in defendant's service, and negligently exposed John Ballard to the dangers and hazards of working with this reckless, unsafe, and unfit servant, dangers which were unknown to Ballard, and from which he lost his life.

In *Sullivan v. L. & N. R. R. Company*, 115 Ky. 447, 74 S. W. 171, 103 Am. St. Rep. 330, the foreman of a switching crew as a prank put a torpedo on the track in front of the engine to alarm one of the hands working with him. The torpedo went off, and a piece of it struck the hand in the leg. He sued the railroad to recover damages. It was held that as the foreman was discharging no duty to the master in placing the torpedo on the track, but was merely playing a prank on one of the men working with him, the master was not responsible for the acts of the servant not done in his service. In *L. & N. R. R. Company v. Routt*, 76 S. W. 513, 25 Ky. Law Rep. 887, the fireman on a locomotive intentionally threw a lump of coal at the plaintiff, who was standing on the side of the track, intending to hit him with the coal. In thus throwing the coal he was discharging no duty which he owed to the master, and it was held that the railroad company was not answerable. In *Railroad Company v. Cooper*, 88 Tex. 607, 32 S. W. 517, the engineer and fireman intended to play a practical joke on Cooper by injecting water into his pockets through a hose, and, by mistake turned on hot water and steam. He was badly burned, and brought suit against the railroad to recover for his injuries. It was held that he could not recover. In *Galveston, etc., Railroad v. Currie*, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, the Supreme Court of Texas had before it a case very similar to this. In that case the foreman of the shop, who

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had a crew of men under him, as a prank, turned the air hose on one of the men, and, when he jumped, turned it on another. No bad effect was seen at the time, but subsequently the man died from the air having entered the rectum and ruptured the bowels. In that case the only physician who was examined as a witness testified that he had not believed such a thing could be possible, and that it was the most remarkable accident of which he had ever heard. It was there held that the master was not responsible for the servant's prank.

It is earnestly insisted, however, that this case differs from all of those cited in this: that it is alleged here that Hodge was a careless, reckless, and stupid boy, utterly unfit to handle the air hose; and that the defendant knew of his incapacity and knew that he was in the habit of using the hose in a playful, improper, and reckless manner. Ballard and Hodge were fellow servants. The master is responsible only for the acts of the servant within the scope of his employment. The master must exercise ordinary care in the selection of his servants and if he fails to exercise such care, and one of the servants is injured by the incapacity of another servant, the master is liable, but the incapacity of the fellow servant must relate to the duties required of him by the master. If the fellow servant is entirely competent to discharge the duties assigned him by the master, and he should, without authority from the master, undertake to do things beyond the scope of his employment, the master would not be liable for his negligence in these matters on the ground that he was not a suitable person for that service. Boys are employed as apprentices in all shops, and yet there are in all shops many duties that may not safely be intrusted to these boys, and, if a boy should voluntarily leave the scope of the duty assigned him by the master without authority, the master would not be liable to a fellow servant who was injured by reason of his incapacity to do the work which he had thus wrongfully assumed. It is not shown in the petition that the use of the air hose was part of Hodge's duty. The fair inference from the petition is that Hodge only used the air hose to play pranks. If he had used the water hose supposing that he was turning on cold water, and had, in fact, turned on hot water, thus burning Ballard, manifestly the railroad would not be answerable simply because the hot water was a dangerous agency, and it had retained Hodge in its employment knowing that he was in the habit of turning the hose on the other boys as a prank. Compressed air is used in all shops to blow away the filings or cuttings, so that the progress made by the tool may be seen. It is ordinarily entirely harmless. If turned on a person at any other point than near the rectum, it simply stings a little; and that the air, when striking near the rectum, would go through the clothes and into the rectum to such an extent as to rupture the bowels,

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would perhaps never occur to any one who had not heard of the possibility of such an accident. Compressed air is no more dangerous than the tools ordinarily furnished to the men to work with in shops. One apprentice might hurt another with his hammer or with a piece of iron in playing a prank on him. No shop can be conducted without agencies that are more or less dangerous when improperly used, and the master is not responsible if an apprentice gets hold of some tool not committed to him, and uses it in a way to hurt another in playing a prank on him, unless the danger was so imminent that a person of ordinary prudence would have guarded against it. Dangerous instrumentalities like nitroglycerine or dynamite must be carefully kept, and should not be put where ignorant or reckless persons may injure others with them, but a compressed air hose is not a deadly thing, and the same rule that would apply to a dynamite cartridge or package of nitroglycerine cannot be applied to it. An air hose is as common a tool in a shop as a lathe or furnace, and there are in nearly all shops apprentices; nor is it uncommon that apprentices play pranks on one another.

The sum of all the facts alleged is about this: That Hodge, in using an air hose as a prank on Ballard, caused his death, when there was nothing in the appearance of the thing to suggest danger to him or to Ballard, and when, in so doing, he was discharging no duty to the defendant. When the master has selected fellow servants competent to discharge the duties assigned to them, he is not responsible for an injury which they may do in a prank outside of their duties, unless they use an instrument that was dangerous, and the master, with knowledge of the deadly character of the thing, has failed to exercise such care as a man of ordinary prudence would exercise in keeping it so that it would not do injury. The master in selecting his servants is not required to take into consideration the pranks one servant may play on his fellows outside of the scope of his duties. The master has no right to control his servant outside of his service as to the pranks he may play on his fellows. As to these, the master is under no greater responsibility to the fellow servants than to a stranger. If Ballard had not been in the services of the railroad company, it would hardly be maintained that the company would be responsible to him on the facts alleged. Dangerous agencies must not be intrusted to unfit hands, and proper care must be exercised to protect others from them. But the duty to guard a dangerous agency, in the sense in which the terms are used in the rule referred to, does not extend to such a thing as an air hose on the facts shown. An air hose is an instrument so familiar and usually so harmless that we do not see how this principle can be applied to it.

Judgment affirmed.

SANDLIN v. LEXINGTON RY. CO.

(Court of Appeals of Kentucky, May 20, 1908.)

[110 S. W. Rep. 374.]

Carriers—Street Railroads—Passengers—Contributory Negligence.*

—It is not per se negligence for a passenger on a street car to make preparations to alight from the car before it comes to a standstill, or to get off before the car actually stops.

Same—Negligence.†—When a car has slackened its speed to enable a passenger to alight therefrom in obedience to notice by him of his purpose to the persons in charge of the car, and the car is running at such a rate of speed that a reasonably prudent person in the exercise of ordinary care for his own safety might attempt to alight, it is negligence to suddenly and violently increase the speed of the car before the passenger has had reasonable opportunity to alight.

Same—Evidence—Instructions.—Where, in an action for injury to a street car passenger, plaintiff's theory was that, when the car had slackened its speed in obedience to a signal given to the conductor to permit him to alight, and he was in the act of preparing to alight, the motorman suddenly and violently started the car, throwing plaintiff to the street, and the theory of the company was that plaintiff, without giving any notice that he desired to alight, jumped from the car when the speed had not been reduced, and all the evidence in the case, including the testimony of plaintiff, established that he attempted to alight from the car before it stopped, an instruction that if plaintiff attempted to alight before the car was brought to a standstill, and in so attempting to alight he was injured, the verdict should be for the company, was erroneous, because in effect a peremptory instruction to find for the company.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Action by W. P. Sandlin against the Lexington Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

C. J. Bronston and Wallace Muir, for appellant.

Stoll & Bush and Morton, Webb & Wilson, for appellee.

*For the authorities in this series on the question whether it is contributory negligence in a passenger to alight from a moving street car, see last foot-note appended to *Lexington Ry. Co. v. Herring* (Ky.), 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635, where all those preceding it are collected.

†For the authorities in this series on the question whether it is negligence to start a street car while a passenger is attempting to board car, find a seat, or alight, see foot-note appended to *Birmingham, etc., Co. v. Hawkins* (Ala.), 27 R. R. R. 689, 50 Am. & Eng. R. Cas., N. S., 689, where all those preceding it are collected.

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CARROLL, J. The petition as amended in this case states the cause of action of appellant, who was plaintiff below, in substance as follows: That he took passage upon one of defendant's cars at or near its central station, to be conveyed to a point on Jackson street near the home of Curtis Kindred, and when he indicated to defendant's employees in charge of the car his desire to leave the car at the point of destination it was slackened in speed for the purpose of allowing him to alight therefrom; that the persons in charge of the car had knowledge of the fact that he was about to alight, but whilst he was still standing upon the rear platform of the car, and had moved toward the step for the purpose of and with the intention of alighting, and before he could place his foot upon the step of said car, the employees of defendant in charge of said car negligently caused the same to suddenly jerk forward and rapidly increase its speed, thereby throwing him with great violence from the car upon the street. The appellee company in its answer denied all the material averments of the petition, and in addition thereto pleaded contributory negligence. Upon a trial before a jury a verdict was returned in favor of appellee company.

On this appeal, prosecuted for the purpose of obtaining a reversal of the judgment upon the verdict, the only error complained of is that alleged to have been committed by the trial judge in giving instruction No. 3, which will be hereafter noticed.

The point on Jackson street to which appellant desired to go is near the corner of Breckinridge street. The car upon which he was riding went out Breckinridge to Jackson street, thence down Jackson to Seventh street. Appellant testified that when he boarded the car he informed the conductor that he wanted to get off near the corner of Breckinridge and Jackson streets; that as they approached the house of Kindred, he indicated to the conductor that he wished to get off, and in response to his signal the conductor rang the bell one time and the motorman slowed down the car; that, assuming that the car had been slowed down for the purpose of allowing him to alight, he took one step forward, holding with his right hand to the upright post on the rear platform upon which he had been riding, and as he was in the act of stepping from the platform to the car step for the purpose of getting off, and when the car was moving at a rate of speed that would have enabled him to alight safely, the car by signal from the conductor suddenly lunged forward and threw him upon the back of his head on the macadamized street.

The evidence of appellee's witnesses tended to establish the following facts: That the speed of the car was slackened as it came around the curve from Breckinridge into Jackson street, but that no signal was given by any one to stop on Jackson street, and the speed of the car as it moved towards Seventh street

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gradually increased after it came into Jackson street; that when the car reached a point on Jackson street nearly half way between Breckinridge and Seventh streets a lady passenger indicated to the conductor to stop the car at Seventh street; that the conductor, in response to her signal, sounded one bell, which was the signal to the motorman to stop at Seventh street, and immediately after the signal was given appellant hurriedly jumped or stepped off the car, receiving the injuries of which he complains.

From this summary it will be seen that the issue between the parties is sharply defined. Briefly, it may be thus stated: The appellant's theory is that, when the car had slackened its speed in obedience to a signal given by him to the conductor to permit him to alight, and he was in the act of getting off, or preparing to get off, the motorman suddenly and violently started the car, throwing the appellant to the street. The theory of appellee is that appellant, without giving any notice that he desired to get off, jumped from the car when the speed had not been reduced, receiving the injuries complained of.

With the evidence in this condition, the court gave to the jury the following instructions:

"(1) If the jury believe from the evidence that defendant's car upon which plaintiff was riding was being slowed down by defendant's employees in charge of the car for the purpose of permitting plaintiff to alight therefrom, and if the jury further believe from the evidence that the plaintiff, when said car was slowing down, was preparing to alight therefrom, and if the jury further believe from the evidence that while plaintiff was so preparing to alight said car was, without notice to plaintiff, and through the negligence of said employees, caused to suddenly start forward at an increased rate of speed, and that the plaintiff, by reason of said car being so suddenly caused to start forward, was thrown from said car, the jury should find for the plaintiff.

"(2) The jury should find for the defendant, unless the jury believe from the evidence that defendant's car upon which plaintiff was riding was slowed down for the purpose of permitting plaintiff to alight therefrom, and that after it was being so slowed down, and while plaintiff was preparing to alight therefrom, said car was, without notice to plaintiff, and through the negligence of defendant's employees in charge of said car, caused to suddenly start forward at an increased rate of speed, and that through said car being so suddenly started forward at such increased rate of speed the plaintiff was thrown to the ground.

"(3) The jury should find for the defendant if the jury believe from the evidence that the plaintiff attempted to alight from defendant's car before said car should be brought to a standstill, and while said car was in motion, and in so attempting to alight he was thrown upon the ground.

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“(4) Before the jury can find for the plaintiff they should believe from the evidence that the plaintiff was thrown from defendant's car by reason of a sudden jerk or forward movement of said car at a time when speed of the car was reduced to an extent or degree which would reasonably warrant an ordinarily prudent person in assuming he could alight therefrom with safety, and that such jerk or forward movement of this car occurred after the plaintiff had given notice to defendant's employees in charge of the car to stop the same for the purpose of enabling the plaintiff to alight therefrom, and after the speed of the car had been reduced by the motorman for the purpose of enabling the plaintiff to alight from the car, and unless the jury should so find, they should find for the defendant.

“(5) If the jury find for the plaintiff they should find for him in such sum in damages not exceeding \$10,000 as will fairly compensate the plaintiff for any mental and physical suffering, if there was any, endured by him by reason of the injury resulting to him from being thrown upon the street from defendant's car, and also for any reduction of his power to earn money, if there is any, caused by any permanent injury, if there has been such permanent injury, resulting to the plaintiff through being thrown from defendant's car.”

Instruction No. 3 is the one complained of. Instructions 1, 2, and 4 presented, as we understand it, the real issue the jury was called upon to try. Instruction No. 3 was in effect a peremptory instruction to the jury to find for appellee, as all the evidence in the case tended to establish that appellant attempted to alight from the car before it stopped. Appellant so testified himself. As the jury were directed by this instruction to find for the appellee company if they believe from the evidence that the appellant attempted to alight from the car before it was brought to a standstill and while it was in motion, there was no reasonable way by which the jury could avoid returning a verdict for the company. Appellant's case was predicated entirely upon the proposition that he had a right to prepare to alight from and to get off of the car when the speed was reduced and the car was running at a rate that would permit him to alight in safety.

Under repeated decisions of this court it is not per se negligence for a passenger in a street car to make preparations to alight from a car before it comes to a standstill, or to get off before the car actually stops. When a car has slackened its speed for the purpose of enabling a passenger to alight therefrom in obedience to notice by him of his purpose to the persons in charge of the car, and the car is running at such a rate of speed that a reasonably prudent person in the exercise of ordinary care for his own safety might attempt to alight, it is negligence to suddenly and violently increase the speed of the car until the

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passenger has had reasonable opportunity to alight from the car. This view is fully supported by the following cases:

In *Louisville & Nashville Railroad Co. v. Eakin's Adm'r*, 133 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872, which was an action by the administrator of Eakin to recover damages for his death, caused by being run over by a train from which he was attempting to alight while it was in motion, it was contended for the company that the attempt of decedent to alight from the train while it was in motion was per se negligence, and that it could not be held responsible for the injury resulting therefrom. But the court rejected this view, and held, quoting with approval from other authorities, that: "It cannot be said as a matter of law that it would under all circumstances be an act of negligence for a passenger to attempt to alight from a moving train. * * * Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the case, taking into consideration all the circumstances in connection with the alighting. * * * If the leap is made under such circumstances as that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the company from the responsibility otherwise resting upon it."

In *Illinois Central Railroad Co. v. Whittaker*, 57 S. W. 465, 22 Ky. Law Rep. 395, it was said: "The decided weight of modern authority is that it is not contributory negligence per se for a passenger to voluntarily alight from a moving train, and that ordinarily it is a question for the jury to determine whether the passenger under the circumstances acted as a reasonably cautious and prudent man."

In *Central Passenger Railway Co. v. Rose*, 22 S. W. 745, 15 Ky. Law Rep. 209, the car, in obedience to a signal by Rose, slowed up for the purpose of permitting him to get on, and when he got hold of the rail and started to step upon the platform the speed of the car was suddenly increased, throwing him to the ground. In response to the plea of the company that he was guilty of such contributory neglect as would defeat a recovery the court said: "We cannot say as a matter of law that it was contributory negligence on the part of Rose to undertake to board a slowly moving electric car. The rate of speed at which it was going on the occasion referred to, the manner of attempting to board it by Rose, and the conduct of the persons in charge of the car after the peril was discovered were matters put in proof before the jury. Their province was to determine from the proof what state of case actually existed, and what acts were or were not negligent acts, under all the proof and the instructions."

To the same effect is *Belt Electric Line Co. v. Tomlin*, 40 S. W. 925, 19 Ky. Law Rep. 433; *Ford v. Paducah City Ry. Co.*

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96 S. W. 441, 29 Ky. Law Rep. 753; Louisville Railway Co. v. Williams, 99 S. W. 245, 30 Ky. Law Rep. 493; Paducah City Railway Co. v. Walsh, 58 S. W. 431, 22 Ky. Law Rep. 532; L. & H. & St. L. Ry. Co. v. Coons, 76 S. W. 45, 25 Ky. Law Rep. 509; Bishop v. Illinois Central Railroad Co., 77 S. W. 1099, 25 Ky. Law Rep. 1363; Illinois Central Railroad Co. v. Glover, 71 S. W. 630, 24 Ky. Law Rep. 1447.

On a retrial of the case instruction No. 3 should be omitted.

Wherefore the judgment of the lower court is reversed, with directions for a new trial in conformity with this opinion.

ANDERSON v. SOUTH CAROLINA & G. R. CO.

(Supreme Court of South Carolina, July 22, 1908.)

[61 S. E. Rep. 1096.]

Trial—Instructions—Questions Covered by Other Instructions.—

Where, in an action against a railroad company for injury to a passenger, caused by the alleged negligent and wanton breach of duty by the defendant to provide for the safety of its passengers, the court, in giving requested instructions submitted to it, charged the jury clearly and fully on the subject of proximate cause, its failure to recur to that subject again in its general charge was at most inadvertent, and was not error.

Appeal and Error—Review—Harmless Error—Instructions—Presentation of Questions in Lower Court.—Since it is elementary that negligence, to be actionable, must be the proximate cause of the injury sued for, failure of the trial court in an action of tort to so instruct the jury is not ground for reversal, in the absence of a showing of prejudice, where counsel did not call the attention of the trial court to the matter.

Carriers—Carriage of Passengers—Duty of Carrier.*—It is, in general, the duty of a carrier of passengers to provide accommodation sufficient for their safe transportation.

Same.*—The duty of a carrier to provide accommodations sufficient for the safe transportation of its passengers extends to taking extra precautions, when the carrier has reasonable grounds to anticipate unusual hazard to its passengers, and to the employment of a sufficient force of employees to protect innocent passengers from the assaults of other passengers, when it has reasonable grounds to apprehend such assaults from passengers in such numbers or force as to be beyond the control of the ordinary train crew.

*For the authorities in this series on the subject of the duty of a carrier to protect its passengers from other of its passengers, see extensive note, 6 R. R. R. 435, 29 Am. & Eng. R. Cas., N. S., 435; footnote appended to Brehony v. Pottsville Union Traction Co. (Pa.), 24 R. R. R. 603, 47 Am. & Eng. R. Cas., N. S., 603.

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Trial—Instructions—Charge on Facts.—It is error in an action of tort for the trial court to charge that certain facts constitute negligence.

Same.*—In an action by a passenger against a railway company for injuries, caused by the alleged negligent and wanton breach by defendant of its duty to provide for the safety of its passengers, an instruction that, when a common carrier has knowledge of or from circumstances ought to know that on certain days of the week large crowds of passengers board its trains at certain regular stations, it is the carrier's duty to provide sufficient accommodations to safely transport its passengers, without subjecting them to unnecessary risk and danger from lack of accommodations, and if the carrier knew or had reasonable grounds to anticipate danger from the handling of such large crowds, it is also held to the highest degree of care on such occasions to provide sufficient force of employees to control the large crowds, though this may require the employment of an extra force of help, so as to protect innocent people from assaults or other injuries at the hands of fellow passengers, was not erroneous as a charge on the facts.

Same—Assuming Facts as Proved.—In an action by a passenger against a railroad company for injury, caused by the negligent and wanton breach of duty by the defendant to provide for the safety of its passengers, an instruction implying that persons on the train were boisterous and drunken passengers was not erroneous, where there was no dispute as to that fact; the controversy being simply as to whether defendant was responsible for an injury inflicted by one of such passengers on another.

Carriers—Carriage of Passengers—Regulations—Statutory Provisions—Construction—"Reasonable."—The word "reasonable," as used in Civ. Code 1902, § 2157, requiring every railroad to furnish "reasonable" accommodations for the convenience and safety of passengers, was intended to have a broad meaning, and signifies that the accommodations shall be reasonable, as distinguished from extreme luxury or scantiness—that is, sufficient for all reasonable purposes—and further conveys the meaning that reasonable efforts considering all the circumstances, must be made to provide such sufficient accommodations.

Same—Instructions—Particular Words Used—"Reasonable."—In an action by a passenger against a railroad company for injury, caused by the negligent and wanton breach of duty by the defendant to provide for the safety of its passengers, an instruction requiring the carrier to use "sufficient" accommodations, instead of "reasonable" accommodations, as required by statute, was not erroneous, where from another instruction given it was manifest that the court did not intend to convey to the jury by use of the word "sufficient" any meaning beyond that intended by "reasonable" as used in the statute, and

*See foot-note on preceding page.

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in that connection read to the jury the section of the statute requiring railroad companies to furnish "reasonable" accommodations.

Appeal from Common Pleas Circuit Court of Aiken County;
R. Withers Memminger, Judge.

Action by B. J. Anderson against the South Carolina & Georgia Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 77 S. C. 434, 58 S. E. 149.

Hendersons, for appellant.

Croft & Sally and *Sawyer & Owens*, for respondent.

WOODS, A. J. On June 28, 1902, a riot occurred on defendant's passenger train running from Augusta, Ga., to Aiken, S. C. The plaintiff, an innocent passenger, having been shot in the leg by another passenger engaged in the riot, brought this action to recover damages, alleging the injury to have been due to the defendant railroad company's negligent and wanton breach of its duty to provide for the safety of its passengers. A former judgment in favor of the plaintiff was set aside, and a new trial ordered for error in instructions to the jury. 77 S. C. 434, 58 S. E. 149. The plaintiff recovered judgment on the second trial, and the defendant again appeals, alleging error in the instructions to the jury. The charges against the railroad company of negligent and wanton misconduct, constituting proximate causes of the injury, may be thus shortly stated: (1) Allowing a crowd of boisterous, quarrelsome, and disorderly persons to become passengers on the train in Augusta, and to remain thereon; (2) failure by defendant to furnish proper and sufficient cars and accommodations for the safe transportation of the large number of passengers whose presence on the train it had reason to anticipate, so that its cars were overcrowded to the extent that the defendant could get no seat and was forced to stand in the aisle of the car; (3) failure to make the provision required by the statute law of the state for the separate accommodation of the white and colored passengers, so that white and colored passengers were allowed to occupy together the coach in which the riot occurred between them; (4) failure to quell the riot or to provide a sufficient force for that purpose, when the company had reason to expect a boisterous and disorderly crowd on its train.

In certain portions of the charge quoted in the exceptions, the circuit judge instructed the jury the defendant would be liable if negligent in the particulars charged in the complaint, without specifically stating, in the same connection, that negligence of the defendant would not be actionable unless it was the proximate cause of the injury. The exception as to this omission must fail for two reasons: In giving the requests submitted to him, the

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circuit judge charged the jury clearly and fully on the subject of proximate cause, and his failure in his general charge to recur to the subject again was at most a mere inadvertence. But, aside from that, the point is not available to the defendant for another reason. The doctrine is elementary that negligence, to be actionable, must be the proximate cause of the injury alleged. Therefore, when the circuit judge fails so to instruct the jury in an action of tort, involving the charge of negligence, the counsel must know the omission to be due to inadvertence and not to any difference of opinion on the subject, or to an intention to deny such a familiar rule. It may not be safe to lay down a hard and fast rule that counsel must in all cases call the attention of the presiding judge to an omission or a statement which every lawyer would immediately recognize as an inadvertence; but it ought to be a strong case which would induce this court to reverse a judgment on the ground that such an omission was prejudicial error, probably affecting the mind of the jury, when it had not been important enough to attract the attention of capable counsel, watchful to discover mistakes. The duty is always owing to the court from attorneys in the cause to call attention to such inadvertences when they are regarded of consequence. In this case, if counsel for defendant wished a correction of the inadvertence and a restatement of the subject of proximate cause, they should have mentioned the matter to the circuit judge at the conclusion of his charge.

The following instruction is alleged to be charged on the facts, and therefore in violation of the Constitution: "That when a common carrier, its agents and servants, have knowledge of or from circumstances ought to know that on certain days of the week large crowds of passengers board its train of cars at certain regular stations in a populous vicinity along its line of railroad, it is the carrier's duty, under such circumstances, to provide sufficient accommodations as required by law, so as to safely transport its passengers without subjecting them to unnecessary risk and danger from lack of accommodations to handle such large crowds of passengers, and, if the carrier knew or had reasonable grounds under the circumstances to anticipate danger from the handling of such large crowds, it is also held to the highest degree of care, on such occasions, to provide a sufficient force of employees and servants to control the large crowds of passengers, though this may require the employment of an extra force of help, so as to protect innocent passengers from assaults or other injuries at the hands of fellow passengers, and should the carrier fail to perform either of these duties, in consequence of which a passenger sustains an injury from another passenger, without fault on his part, it is liable in damages." The rule is well established that it is error for the circuit judge to charge

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that certain facts constitute negligence. *Pickens v. Railroad Co.*, 54 S. C. 509, 32 S. E. 567. The instruction here complained of was not a violation of the rule. When analyzed, it is evidently nothing more than a statement of a proposition of law that it is in general the duty of a carrier of passengers to provide accommodations sufficient for their safe transportation, and the less broad but not less general proposition of law that the duty extends to taking extra precautions when the carrier has reasonable grounds to anticipate unusual hazard to its passengers, and the more specific proposition of law that the duty extends to the employment of a sufficient force of employees to protect innocent passengers from the assaults of other passengers when it has reasonable grounds to apprehend such assaults from passengers, in such numbers or force as to be beyond the control of the ordinary train crew. These obligations are imposed by law, and the statement of them was a statement of legal propositions, and not a charge on the facts. The circuit judge did not intimate that the defendant had failed to take adequate precautions, nor that the circumstances required the defendant to provide an extra force or to take any other unusual precautions.

The point made in the fourth exception, that it was error for the circuit judge by his charge to imply the presence on the train of boisterous and drinking passengers, cannot be sustained, because there was no dispute about that fact. The real controversy was whether the defendant was responsible for an injury inflicted by one of such passengers on another passenger.

Counsel for defendant strongly urged that the circuit judge in his charge erroneously imposed on the carrier the duty of providing "sufficient" accommodations, when the statute only requires "every railroad shall furnish reasonable accommodations for the convenience and safety of passengers." The word "reasonable," used in the statute, was manifestly intended to have a broad meaning and application. It signifies that the accommodations shall be reasonable as distinguished from extreme luxury or scantiness; that is, not excessive nor meager, but sufficient or sufficing for all reasonable purposes. The further meaning is conveyed that efforts, reasonable, considering all the circumstances, must be made to provide such sufficient accommodations. That the circuit judge could not have conveyed to the jury by the use of the word "sufficient" any meaning beyond this is manifest from this instruction: "That if a common carrier did not know or had no reasonable grounds to anticipate that large crowds of passengers boarded its cars on certain days, then it is not called upon in law to furnish extra accommodations for something it had no reason to expect, and may, under such circumstances, use such accommodations as they have generally found sufficient for passenger traffic. However, should a large

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crowd of passengers unexpectedly board the train, it is the duty of the carrier, before it permits the white and colored passengers to ride in the same coach, to procure another coach at the time, if it can be procured; it being for the jury to say whether another coach should have and could have reasonably been provided, and if the carrier, under the aforesaid circumstances, without making an attempt to procure another coach at the time (provided the jury finds it should have attempted to procure another coach) permits the white and colored passengers to ride in the same coach, then, if this be the proximate and main cause of bringing about a riot which results in injury to a passenger without fault on his part, then the carrier is liable in damages." In connection with this, the circuit judge read to the jury section 2157, Civ. Code 1902, requiring railroad companies to furnish reasonable accommodations.

The other exceptions were abandoned at the hearing.

The judgment of this court is that the judgment of the circuit court be affirmed.

SOUTH COVINGTON & C. ST. RY. CO. v. QUINN.

(Court of Appeals of Kentucky, May 21, 1908.)

[110 S. W. Rep. 404.]

Carriers—Street Railroads—Passengers—Failure to Give Transfer—Actions.—In an action against a street railway company for failure to give a transfer to a passenger, the evidence held to make a prima facie showing that plaintiff was on one of the company's cars, and that one of its conductors refused to give a transfer.

Same—Protection of Children—Obligation of Carriers.*—Carriers are under a peculiar obligation to children traveling alone in their vehicles.

Same — Refusal to Give Transfer — Personal Injuries — Excessive Damage.†—In an action against a street railway company for failure to give a transfer, it appeared that plaintiff, a girl 11 years old,

*See second foot-note appended to *Illinois Cent. R. Co. v. Allen* (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49.

†For the authorities in this series on the subject of the damages recoverable against a carrier of passengers for refusal or failure to transport passengers, or delay in transporting them, see foot-note appended to *Schmidt v. Cleveland, etc., Ry. Co.* (Ky.), 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149, where all those preceding it are collected; first foot-note appended to *Tilburg v. Northern Cent. Ry. Co.* (Pa.), 27 R. R. R. 325, 50 Am. & Eng. R. Cas., N. S., 325; *Louisville & N. R. Co. v. Gaddie* (Ky.), 27 R. R. R. 331, 50 Am. & Eng. R. Cas., N. S., 331; last foot-note appended to *DeBoard v. Camden Interstate Ry. Co.* (W. Va.), 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84; last foot-note appended to *Missouri, etc., Ry. Co.*

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lived at L. and went to school at N.; that she took a car at N. for C., and paid the fare; that the conductor refused to give her a transfer entitling her to take a car at C. for L.; and that she was obliged to walk home from C. It was a dark evening, and she suffered from fright and from sickness caused by her running home. Held, that a verdict for \$425 was not excessive; a recovery for fright and for the sickness being authorized.

Same—Failure to Carry Passengers—Refusal to Give Transfer.—Where a person entered a street car to go to a designated place and paid the fare, and the company was obliged to carry her to the designated place and give her a transfer to enable her so to do, the refusal to give a transfer was a refusal to carry her to her destination.

Appeal from Circuit Court, Kenton County, Law and Equity Division.

“Not to be officially reported.”

Action by Catherine Quinn against the South Covington & Cincinnati Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ernst & Cassatt, for appellant.

B. F. Graziani and *H. D. Gregory*, for appellee.

HOBSON, J. In October, 1903, Catherine Quinn, a little girl 11 years old, who lived at Ludlow, Ky., went to school in Newport, Ky. She took a street car in Ludlow which carried her to Fourth and Madison streets, in Covington. There she was given a transfer, and took the Newport car, which carried her to Newport. In the evening when she went home she took a car in Newport, and, when she got to Fourth and Madison streets in Covington, was transferred to the other car for Ludlow. She paid her fare on the first car always, and was given a transfer to the other car. She had gone to school in this way for some time, when, as she was going home in October one afternoon, after taking the car in Newport, she paid her fare and asked the conductor for a transfer to Ludlow. He said: “All right, after a while.” When the car got to the Licking river bridge, and he had not yet given her the transfer, she asked for it again. He then did not make any reply, just looked at her, and went on. When the car reached Fourth and Madison streets, when she went to get off, she said to the conductor: “Please give me a transfer.” In a loud insulting tone he said to her: “Get off. I haven’t time to

v. Smith (C. C. A.), 25 R. R. R. 50, 48 Am. & Eng. R. Cas., N. S., 50; *Lindsay v. Oregon Short Line R. Co.* (Idaho), 24 R. R. R. 616, 47 Am. & Eng. R. Cas., N. S., 616; last foot-note appended to *Pierson v. Illinois Cent. R. Co.* (Mich.), 24 R. R. R. 591, 47 Am. & Eng. R. Cas., N. S., 591; second foot-note appended to *Norton v. Consolidated Ry. Co.* (Conn.), 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

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bother with you." At this she got off the car, and, not having a transfer for the Ludlow car, did not get on it. She did not know what to do. It was a dark afternoon, and she undertook to walk home, following the line of the street car track. It took her about an hour and a half to get home. For a part of the way there were no houses, and the way was muddy. She became frightened, and ran. When she reached home, she was in a bad nervous condition, and a doctor was sent for. She was sick in bed for a week, and was unable to go to school for half the time that winter. This suit was brought to recover for her injuries. The circuit court dismissed the petition, but on appeal to this court the petition was held sufficient. See *Quinn v. Cincinnati, N. & C. R. Co.*, 97 S. W. 379, 30 Ky. Law Rep. 15. On the trial of the case the plaintiff introduced witnesses showing the facts above stated. The defendant declined to introduce any evidence. The court instructed the jury, in substance, that if the defendant carried passengers from Newport to Covington, and thence by transfer on its Ludlow line to Ludlow, Ky., the passenger paying the fare on the first car, and when the fare was paid receiving a transfer to Ludlow, and that the plaintiff paid her fare and requested the transfer to Ludlow to which she was entitled, and the conductor refused to give her the transfer, and by reason of his failure to do so she was compelled to walk from Fourth and Madison streets in the city of Covington to her home in Ludlow, Ky., and in doing so became frightened and was made sick and suffered physical or mental pain, they should find for her a fair compensation for such of these things as were the direct and proximate result of the defendant's refusal to give her the transfer. The jury found for her in the sum of \$425, and the defendant appeals.

It is insisted for the defendant that the proof does not show that the plaintiff was on one of its cars, or paid the fare to one of its conductors. It is urged for the plaintiff that these matters are not put in issue by the answer. The circuit court seems to have taken the plaintiff's view of the pleadings; but, aside from that, we think the evidence is sufficient to show *prima facie* that the transaction occurred on one of defendant's cars. The plaintiff testifies that she was on one of the Covington and Newport cars; that these were the cars she always traveled on, and on which she was always given a transfer. The answer of the defendant admits that it ran a line of cars between Newport and Covington and between Covington and Ludlow; and, it not appearing that any other company ran cars between these points, the proof that the transaction occurred on the cars running between these points and on the line which the plaintiff traveled upon on other days is sufficient *prima facie* evidence to show that she was on the defendant's line.

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It is also insisted that no recovery should be allowed for the nervous injury to the child from her becoming frightened, or for the sickness or suffering caused by her running home. From the fact that she got home about a quarter after 5 it is evident that she need not have to run to get home before night. But it was a dark evening, and the child may not have known how long it would be before dark; and, as the outskirts of any town about nightfall are usually not a safe place for a girl, we cannot say that it was unreasonable that she became frightened and did not walk home leisurely. If she had been a grown person, we would not under ordinary circumstances approve the recovery allowed by the circuit court; but here was a child 11 years old set down on the street corner of a city in which she did not live, several miles from home, without any means to get home, and without protection. The conductor of the car was informed several times by the child that she wished a transfer to Ludlow. He could see by her books that she was a schoolgirl returning home, and could not but know that she was asking a transfer to go home. She was alone, and carriers are under a peculiar obligation to children traveling alone in their vehicles. In *C. & O. R. R. Co. v. Lynch*, 89 S. W. 517, 28 Ky. Law Rep. 467, the plaintiff was a girl 15 years old living at Brighton, six miles from Lexington, and went to Lexington to school on the train every morning, returning about 6 o'clock in the afternoon. On October 1st she took the train for home. The conductor took her ticket, but, by mistake, took it to be a ticket for Chilesburg, which is nine miles from Lexington. He did not stop the train at Brighton, and, when they were about one-half way between Brighton and Chilesburg, she called his attention to the fact that he had passed her station, asking him to take her back to Brighton. This he refused to do. When the train got to Chilesburg, he had her to get off and left her standing on the platform, without any acquaintance, in the dark. As she had no money, she set out and walked home. She became very much frightened, and was sick for some time. She sued and recovered a verdict for \$250. On appeal the judgment was affirmed. The testimony of the conductor in that case was in conflict with the testimony of the passenger. He said that he told the agent, Mr. Warnock, to take care of the young lady. In affirming the judgment the court said: "The conductor could see that the girl with her school-books was placed in a very embarrassing position. She did not know Warnock or know anything about him. He did not tell her at any time that he would have Warnock send her home, nor did he tell her who Warnock was, or put her in his care. If he went off and left the girl standing on the platform where she knew nobody, without making any arrangement for her, his conduct was very reprehensible. The girl had no clothes with her

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for the night. She had no money. There was not, so far as appears, any hotel or boarding house there, but there was a livery stable at which a vehicle could be hired, though it does not appear that she knew this, and it was a question for the jury whether she acted as might be reasonably expected of one in her situation at her age." That case is very similar to the one now before us. If the plaintiff was entitled to be carried to Ludlow for the fare which she paid the conductor, and it was the duty of the conductor to give her a transfer, the case would not be substantially different if she had had a ticket for Ludlow, and the conductor, after taking up her ticket, had set her off at the corner of Fourth and Madison streets, in Covington. She could not get upon the other car without any transfer, as she had no money. Under the evidence the plaintiff was entitled to be carried from Newport to Ludlow. The giving of a transfer did not change the essence of the transaction. Nor was it material that she was to be carried a part of the way on one car and a part of the way on another car. When she entered the car to go to Ludlow and paid the fare to take her to Ludlow, the defendant was under obligation to carry her to Ludlow, and, when it refused to give her the transfer, this was a refusal to carry her to Ludlow. There is therefore no substantial difference between this and the Lynch Case.

The verdict here is for \$425. The verdict there was for \$250. The difference is not so much as to justify us in awarding a new trial on the ground that the verdict is excessive. If the plaintiff's testimony is true, and it is uncontradicted, she was in fact damaged and in fact suffered much more than the plaintiff there.

Judgment affirmed.

STATE *ex rel.* McCUE, Atty. Gen., *v.* GREAT NORTHERN RY. CO.

(Supreme Court of North Dakota, April 22, 1908.)

[116 N. W. Rep. 89.]

Constitutional Law—Due Process of Law—Regulation of Carriers.*

—The provision of chapter 199, p. 327, Laws of 1907, requiring railway corporations to sell 1,000-mile tickets to purchasers, to be used by themselves, their wives, and children, at a rate lower than the maximum rate under which others may purchase such tickets, is a violation of the federal Constitution, which entitles the railroad company to due process of law and the equal protection of the laws.

Courts—Decision of Supreme Court of United States—Conclusiveness.—A decision of the Supreme Court of the United States, holding a law similar to this provision of chapter 199, p. 327, Laws of 1907, unconstitutional under the federal Constitution, is conclusive upon this court and all state courts in determining the validity of said provision.

(Syllabus by the Court.)

Application by the state, on the relation of T. F. McCue, Attorney General, for writ of mandamus against the Great Northern Railway Company. Writ denied.

T. F. McCue, Atty. Gen., in pro. per.

W. R. Begg and *Murphy & Duggan*, for defendant.

MORGAN, C. J. This is an application for a peremptory writ of mandamus. On the 7th day of August, 1907, the Attorney General presented his application for said writ, and in his petition alleged the following facts: That the defendant corporation is a common carrier, and as such corporation operates and owns a main line of railway across the entire state, and also numerous branch lines extending from said main line to various places within the state, and is engaged in the transportation of freight and passengers within said state. That chapter 199, p. 327, of the Laws of 1907, provides that every common carrier within the state shall issue, upon request of any person, mileage books in denomination of 1,000 miles, and that the said defendant, upon demand for the issue of mileage tickets pursuant to said law, has refused to issue the same, and has refused to comply with the terms of said law. An order was issued against said defendant, citing it to appear in the city of Grand Forks on the 16th day of September, 1907, and show cause why the Attorney General should not have leave to file his petition, and why a writ should

*See foot-note appended to *Commonwealth v. Atlantic Coast Line R. Co.* (Va.), 22 R. R. R. 1, 45 Am. & Eng. R. Cas., N. S., 1.

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not issue against said defendant, compelling it to comply with said law.

On September 20th the defendant appeared, and for a return to said order to show cause, and as reasons why a writ of mandamus should not be issued as prayed for by the relator, filed a return, which, after certain admissions, set forth the following facts as reasons why the said writ should not issue: "That the said law requiring the issuance and sale of mileage books at the rate of 2 cents per mile amounts to an unjust and unlawful discrimination in favor of those persons who shall be able or desire to buy transportation at wholesale or in the form of such mileage books, and against those who are unable or do not desire to buy transportation at wholesale nor in the form of such mileage books, and amounts to an unjust discrimination in favor of persons the members of whose families are adults, and against those persons the members of whose families are minors, all in violation of the Constitution of the state of North Dakota and the Constitution of the United States, and particularly article 14 of the amendments of the Constitution of the United States, in that said provision requiring the issue and sale of mileage books as hereinbefore set forth will deprive defendant of its property without due process of law, and will deny to those persons who are unable or unwilling to purchase transportation at wholesale or in the form of mileage books aforesaid, and to those persons the members of whose families are not adults, the equal protection of the laws." There are other allegations in the return which it is not necessary to set forth, in view of the fact that the decision of the case is based upon the allegations just set forth.

After the filing of the application and the return, an oral argument was presented to the court at Grand Forks, and leave was granted to the respective parties to file additional authorities and arguments. No further authorities were submitted, and the case was finally submitted for decision by a stipulation of the parties on the 15th day of April, 1908. The statute on which the application for the writ is applied for is chapter 199, p. 327, of the Laws of 1907, and is entitled as follows: "An act providing for a maximum rate of fare to be charged and collected by railroads, railroad corporations, and common carriers for the transportation of passengers and baggage and providing a penalty for the violation thereof." After providing that the compensation for carrying passengers shall not exceed 2½ cents per mile, that law has an additional provision, which is as follows: "Provided, that every railroad, railroad corporation and common carrier doing business in this state, shall issue, upon request of any person, mileage books in denomination of 1,000 miles, limited to not less than one year from the date of issue and redeemable within one year after the expiration of such limitation, with baggage and

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other facilities similar to those accompanying regular trip tickets, at a price of \$20.00 each; that such mileage books shall be good for travel by the purchaser and such adults members of his family as he may designate, and whose names are then and there written thereon, but the fare shall always be that multiple of five nearest reached by multiplying the rate by the distance."

The defendant makes no point against the constitutionality of the law as a whole; but expressly alleges that it is complying with the provisions of this law, except as to the mileage book provision. As to this provision it claims that it is unconstitutional, as violating the fourteenth amendment to the federal Constitution, as well as the provision of the state Constitution which provides that property shall not be taken without due process of law, and, further, that the act discriminates in favor of certain persons and is not general in its application, and that the law thereby deprives certain persons of the equal protection of the laws guaranteed by the Constitution. The return therefore presents a question of the construction of the provision of this law in view of the fourteenth amendment of the Constitution of the United States. This is purely a federal question, which has been expressly passed upon by the Supreme Court of the United States in a case similar in every respect to this case. In that case the constitutionality of a mileage book enactment of the Legislature of the state of Michigan was under consideration. That enactment provided that railroad companies must keep for sale 1,000-mile tickets, and when required by purchasers they should be issued in the name of the purchaser, his wife, and children, designating the name of each on each ticket, and that these tickets should be valid for two years after date of purchase. The Supreme Court of Michigan held this law a valid enactment, and on appeal to the Supreme Court of the United States the law was declared unconstitutional.

In speaking for the court, Peckam, J., said in the opinion: "The Legislature having fixed a maximum rate, and what must be presumed, *prima facie*, to be also a reasonable rate, we think the company, then, has a right to insist that all persons shall be compelled to pay alike; that no discrimination against or in favor of certain classes of married men, or families, excursionists, or others, shall be made by the Legislature. If otherwise, then the company is compelled, at the caprice or whim of the Legislature, to make such exceptions as it may think proper, and to carry the excepted persons at less than the usual and legal rates, and thus would part in their favor with its property without that compensation to which it is entitled from all others, and therefore would part with its property without due process of law. The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by

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discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not is not a matter of policy to be decided by the Legislature. It is a matter of the right of the company to carry on and manage its concerns, subject to the general law applicable to all, which the Legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction." *Lake Shore & Mich. So. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. The principles of this case were again commented on in distinguishing it from the case of *Wis., Minn. & Pac. R. R. Co. v. Jacobson*, 179 U. S. 288, 21 Sup. Ct. 115, 45 L. Ed. 194, then under consideration, when it was said: "There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation should be rested, unless the simple decision of the Legislature should be held to constitute such reason."

This is an authoritative decision of the precise question at issue here, by the highest court of the land, and is binding upon all state courts, being a decision of a federal question. No useful purpose would be gained by a more extended statement of the grounds on which that eminent court based its decision. Since that decision it has been followed as a binding adjudication by state courts. *Beardsley v. N. Y., Lake Erie & Western R. R. Co. et al.*, 162 N. Y. 230, 56 N. E. 488. In that case the court said: "The Supreme Court of the United States, in *Railway Company v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us." See, also, *Commonwealth ex rel. Atty. Gen v. Atlantic Coast Line R. Co.*, 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983.

As the federal decision is controlling, it follows that the application for the writ of mandamus must be denied. All concur.

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SWIFT & COMPANY, Petitioner, *v.* UNITED STATES.

MORRIS & COMPANY, Petitioner, *v.* UNITED STATES.

CUDAHY PACKING COMPANY, Petitioner, *v.* UNITED STATES.

(Argued January 20, 21, 22, 1908. Decided March 16, 1908.)

[28 Sup. Ct. Rep. 428.]

Carriers—Acceptance of Rebates by Shipper—Secret or Fraudulent Device.—A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating the Elkins act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), making it a criminal offense for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practised.

Courts—Federal Criminal Jurisdiction—Venue—Continuing Offense.—The offense of obtaining transportation of property in interstate or foreign commerce at less than the carrier's published rates, created by the Elkins act of February 19, 1903, is made triable in any Federal district through which such transportation is had, by the provision of that act that violations shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted.

Courts—Federal Criminal Jurisdiction—Venue—Continuing Offense.—The requirement that the prosecution of crimes against the United States be had in the state or district where the offense was committed, which is made by U. S. Const., 6th Amend., is not violated by the provision of the Elkins act of February 19, 1903, under which the offense of obtaining transportation of goods from Kansas City to New York City at less than the carrier's published rates may be tried in any Federal district through which such transportation was conducted.

Carriers—Acceptance of Rebate by Shipper—Exports under Through Bill of Lading.—Shipments under a through bill of lading from an interior point in the United States to a foreign port are embraced in the provisions of the Elkins act of February 19, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates.

Commerce—Export Duties or Taxes.—The mere incidental effect upon exports which may be produced by applying to a shipment

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from an interior point of the United States to a foreign port the provisions of the Elkins act of February 19, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates, does not render such provisions repugnant to U. S. Const. art. 1, § 9, ¶ 5, forbidding the levying of export taxes or duties.

Commerce—Preference of Ports.—Preference is not given to the ports of one state over those of another by applying to articles intended for foreign export the provisions of the Elkins act of February 19, 1903, making it an offense against the United States to accept transportation of goods in interstate or foreign commerce at less than the carrier's published rates.

Carriers—Acceptance of Rebate by Shipper—Contract Fixing Former Rate as Defense.—A shipper is guilty of accepting transportation at less than the carrier's published rates, in violation of the Elkins act of February 19, 1903, where, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it.

Indictment—Sufficiency—Charging Shipper with Accepting Rebates.—An indictment charging a shipper with securing transportation of goods in interstate or foreign commerce at less than the carrier's published rates, in violation of the Elkins act of February 19, 1903, is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates.

Appeal—Prejudicial Error—Submitting Question to Jury.—Submitting to the jury on a prosecution against a shipper for accepting rebates in violation of the Elkins act of February 19, 1903, the question whether or not there was a device to avoid the operation of the act and to obtain the transportation at less than the carrier's published rates, did not prejudice the accused, where, under that act, no device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense, any means by which transportation by a concession from the established rate was had being sufficient to work a conviction.

Carriers—Acceptance of Rebate by Shipper—Criminal Intent.—Intentionally accepting transportation of goods in interstate or foreign commerce at less than the carrier's published rates, which is forbidden by the Elkins act of February 19, 1903, is sufficient to sustain a conviction under that act, although such action may have been taken in good faith, under a claim of legal right.

On writs of certiorari to the United States Circuit Court of

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Appeals for the Eighth Circuit to review judgments affirming convictions in the District Court for the Western District of Missouri for securing transportation of goods in interstate or foreign commerce at less than the carriers' published rates. Affirmed.

See same case below, 82 C. C. A. 135, 153 Fed. 1.

The facts are stated in the opinion.

Messrs. Frank Hagerman, John C. Cowin, A. R. Urion, Henry Veeder, and M. W. Boarders, for petitioners.

Attorney General Bonaparte, Assistant to the *Attorney General Purdy*, and *Mr. A. S. Van Valkenburgh*, for respondent.

MR. JUSTICE DAY delivered the opinion of the court:

These cases are here upon writs of certiorari to the United States circuit court of appeals for the eighth circuit. By stipulation there was a single petition for certiorari, and the cases in the circuit court of appeals were considered together on the record in the Armour Packing Company Case, and, as it is conceded in the brief of the learned counsel for the petitioners that the differences in the cases are unsubstantial, the same course may be followed here.

Each of the petitioners was convicted in the district court of the United States, western district of Missouri, for violation of the so-called Elkins act (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), in obtaining from the Chicago, Burlington, & Quincy Railway Company an unlawful concession of 12 cents per 100 pounds from the published and filed rate on that portion of the route between the Mississippi river and New York, for transportation upon a shipment made August 17, 1905, for carriage by rail of certain packing-house products from Kansas City, Kansas, to New York for export. Upon writs of error from the circuit court of appeals of the eighth circuit the sentences of conviction were affirmed. 82 C. C. A. 135, 153 Fed. 1.

The facts in the Armour Case are briefly these: From May 9 to August 6, 1905, the Chicago, Burlington, & Quincy Railway Company, with its connecting railroads east of the Mississippi river, under joint traffic arrangements, had filed, published, and posted in accordance with the acts of Congress the rates of shipment of the character in question, and showing that the proportionate part thereof from points on the Mississippi river to New York was 23 cents per 100 pounds. Upon June 16, 1905, the packing company contracted with the Wilson Steamship line for space upon boats sailing in August for certain shipments, and notified the Burlington Company thereof, giving it a copy of the contract. On June 17, 1905, the Burlington Company contracted with the packing company to carry export shipments from Kansas City, Kansas, of products named, until December 31, 1905, at a rate the proportionate part of which from the Missis-

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Mississippi river to New York City was 23 cents per 100 pounds, as aforesaid. Upon August 6, 1905, the tariff was amended and duly published and filed, showing that the proportionate part from the Mississippi river to New York City was 35 cents instead of 23 cents per 100 pounds. One of the connecting railroads then objected to the carrying of the freight at the contract rate hereinbefore stated, and a controversy arose between it and the Burlington Company as to whether such contract should apply, the Burlington Company claiming that it should, the connecting carrier denying this contention. Upon August 17, 1905, the packing company delivered at Kansas City, Kansas, to the Burlington Company, 67 tierces of oleo oil, property of the character covered by the contract, for export to Christiania, Norway, and upon receipt thereof at Kansas City, Kansas, the Burlington Company issued and delivered a bill of lading, agreeing to carry the same to the point of destination for a through rate, which included the carriage by, and the rate of, the steamship line, which bill of lading was, according to the ordinary course of business, delivered to the Traders Despatch, one of the connecting carriers, which took the same up and issued a through bill of lading for the goods at the through rate. The bill was in triplicate, one copy thereof being delivered to and accepted by the steamship company. The packing company paid to the Burlington Company, as the initial carrier, the full through rate for the carriage over the line of the Burlington Company and its connecting carriers and that of the steamship line, and, from the time of the delivery of the freight to the railway company at Kansas City, Kansas, until it was delivered at the export destination, it was exclusively handled by the carriers, rail and steamship, the shipper having nothing to do with it. The Burlington Company did, with connecting lines, transport the property from Kansas City, Kansas, through the western district of Missouri and other states and districts to New York City, where the same was delivered to the steamship line. The full rate for the through carriage thus paid was made up so that the proportional part of the railroad carriage east of the Mississippi river was 23 cents per 100 pounds, instead of 35 cents per 100 pounds, fixed by the amended and published rate. The packing company, at the time of making the shipment and paying the freight, knew of the filing and publishing of the amended tariff of August 5, 1905, but did not know how the rate was apportioned or divided, or made up among the respective carriers or points, except that it knew the steamship rate as named in the contract with the steamship owners.

At the time aforesaid the Burlington Company was a common carrier, engaged in the transportation of property by railway under contract agreements and traffic arrangements with certain other lines, extending from Kansas City, Kansas, east to the

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city of New York and other seaboard points. There were no fixed contract agreements or traffic arrangements with the steamship lines, which were conducted as hereinafter set forth. The ocean rate is variable, depending upon the season, weather, and other matters. The steamship must sail at a given date and has a certain amount of space to be filled, so that space may be at one time quoted to one person at one price and at another time to another person at a different price. The question of such rates varies from hour to hour, as well as from day to day. For these, among other reasons, there was no contract agreement or traffic arrangements between the railroads and export steamship lines. The reservation of space upon an ocean steamer in advance is an important thing, so that the packing company can be certain that its shipment can go on the boats sailing at specified times. The packing company has houses in different parts of the United States, so that it cannot always, at the time of the contract for space, know from what particular point and over what road the shipments will go.

Before August 6, 1905, shipments were made according to the terms of the contract aforesaid, which were carried under the terms thereof. The Armour Company contended and insisted that the amendment increasing the tariff rate did not and could not abrogate or impair the term of its contract.

These prosecutions were under the Elkins act (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), and the first question argued concerns the construction of that act, as to what constitutes a crime on the part of the shippers so far as obtaining a shipment by some manner of device is concerned, it being the contention of the petitioners that, in order to work conviction, the shipper must be guilty of some bad faith or fraudulent conduct in the use of the device, or obtain the rebate by some intentionally dishonest or underhanded method, concession, or discrimination denounced by the act. The history of the act in this feature may be of service in interpreting the meaning of Congress. The act of February 4, 1887, made no provision for criminal offenses against the shippers, but it was provided (§ 2, 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3155), that if the common carrier should, directly or indirectly, by any special rate, rebate, or other device, demand, collect, or receive, through any person or persons, a greater or less compensation for any service rendered or to be rendered in the transportation of property subject to the provisions of the act, than it charges, demands, collects, or receives, etc., from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially the same circumstances, such common carrier shall be deemed guilty of unjust discrimination, which by the act was prohibited and made

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unlawful. And it was made unlawful for a common carrier to deviate from the published schedule of rates, fares, and charges. 24 Stat. at L. § 6, p. 381, chap. 104, U. S. Comp. Stat. 1901, p. 3156.

By the act of March 2, 1889 (25 Stat. at L. 857, § 2, chap. 382, U. S. Comp. Stat. 1901, p. 3161), the shipper was brought within certain criminal provisions of the law, and one who should knowingly and wilfully, by false billing, false classifying, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, with or without the consent or connivance of the carrier, obtain or dispose of property at less than the regular rate established and in force, should be deemed guilty of fraud.

It will be noticed that, in these statutes, the term "device" is associated with other words indicative of its meaning, and, in the act of March 2, 1889, the shipper, for falsely acting as to weighing, billing, classifying, or obtaining the transportation of property at less than the regular rate, or by any other device, was deemed guilty of fraud. In this act the terms "device," as one of the means of consummating a fraud, shows the sense in which the term is used by Congress. It was only fraudulent conduct in obtaining transportation at less rates than others, which was denounced by the act, and the imposition aimed at was principally such as might be practised by the shippers upon the carriers in order to procure the preference.

When we come to the Elkins act we find the following provisions (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880) :

"The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practised. Every person or corporation which shall offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty

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of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

In this act we find punishment by imprisonment abolished, and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practised. And we find the word "device" disassociated from any such words as "fraudulent conduct, scheme, or contrivance," but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention; a project," etc.

This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.

The views of this court, speaking through Mr. Justice White, in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272, 277, are apposite here:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariff, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

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The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

It is next contended that there is no jurisdiction to prosecute the offense named, because the alleged offense, if any, was not committed in the western district of Missouri, where the prosecution was had, but the same was complete in Kansas City, in the state of Kansas; and it is contended in this connection that if the act can be construed to include prosecution in other districts it is unconstitutional within the provisions of the 6th Amendment of the Constitution of the United States, which provides that the accused shall have the right to be tried by an impartial jury of the state and district wherein the crime shall have been committed. Art. 3, § 2, 6th Amendment.

As to the construction of the act, in addition to the section of the act above quoted, it is further provided in the Elkins law (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), as to jurisdiction:

Prosecution—Jurisdiction. "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

In this case the indictment charges the actual transportation of the property from Kansas City, Kansas, to New York City, the course of transportation being through the western district of Missouri, in which the prosecution was had.

We are not now concerned with the construction of the act in making provision for punishing the carrier or shipper for offering, granting, or giving, or soliciting, accepting, or receiving, rebates, concessions, or discriminations, irrespective of actual transportation, for it is specifically made an offense to receive any rebate or concession whereby any such property is, by any device whatever, transported at a less rate than that named, published, and filed by the carrier; and jurisdiction is given to prosecute in any criminal court of the United States in the district through which the transportation may have been conducted.

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Having in view the offense charged in this case, we think it is clearly within the terms of the act making it penal to procure the actual transportation, by any of the means denounced in the act, of goods at a less rate than that named in the tariffs. It is the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates. Wherever such transportation is received, there the offense is to be deemed to have been committed. Why may this not be so? In this feature of the statute, the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, it is equally and at all times committed.

Congress also embraced in § 1 of the Elkins act offenses not depending upon actual transportation through districts; and, as to the trial of such, it also made provisions in the venue section.

For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting, or receiving of rebates, concessions, or discriminations, "whereby any other advantage is given or discrimination is practised" in respect of interstate transportation.

Congress doubtless had in mind that some of these offenses might be complete in a single district; some might be begun in one and completed in another; and those wherein transportation—actual carriage—was made an essential element might continue through several districts; and hence undertook to provide places for trial of any offense which might be committed against the provisions of the act. It is at least certain that these sections, construed together, make an offense of obtaining transportation at a concession from the published rate, which shall be triable in any district through which it is had. That is the offense of which the accused is charged in this case, and such is the district in which it was tried.

It is contended that the contrary was held in the case of *Davis v. United States*, 43 C. C. A. 448, 104 Fed. 136, decided in the circuit court of appeals for the sixth circuit. In that case the prosecution was for false billing by the shipper, under § 2 of the act of 1889, wherein the statute provided punishment for the offense in a single district, and it was there held that the crime was complete in the district in which the false billing was made and the goods delivered to the carrier for transportation, and that its actual carriage was not an essential element of the offense; and that a prosecution in Texas for goods falsely billed and delivered to the carrier in Ohio could not be maintained.

Under the amended act, transportation with a rebate, or at a concession from the established rates, is made an offense as to the shipper as well as the carrier, thereby differentiating the

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Elkins act from § 2 of the act of 1889, as construed in the Davis Case. In the Davis Case it was specifically said:

"Such transportation may be through a number of districts, but Congress has given jurisdiction for punishment of the crime in the district in which the offense is committed. It must have been in the contemplation of Congress that the fraudulent representations may be made in one place, and the transportation, in the sense of actual carriage, obtained as a result thereof, may be to a state or district remote from the place of delivery, and through a number of districts of the United States. If it was contemplated that the crime could only be committed when the carriage contracted for was concluded, quite a different provision would have been inserted than the one requiring punishment in the district where committed. Congress, in passing this act, and providing for the place of trial and punishment in a single district, evidently contemplated the consummation of the offense at the place where the goods are billed by the shipper and the delivery for transportation takes place."

But it is said this construction of the act is in violation of the 6th Amendment of the Constitution of the United States, which requires crimes to be prosecuted and punished in the state or district where the same are committed, and that, as the transportation was had, at least in part, in Kansas, the offense was there completed and could not be prosecuted elsewhere. But the constitutional provision does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense, and not the personal presence of the offender. *Re Palliser* (*Palliser v. United States*) 136 U. S. 257, 265, 34 L. ed. 514, 517, 10 Sup. Ct. Rep. 1034; *Burton v. United States*, 202 U. S. 344, 387, 50 L. ed. 1057, 1073, 26 Sup. Ct. Rep. 688. This doctrine finds illustration in *Palliser's Case*, *supra*, in which a person was prosecuted in Connecticut for mailing a letter in New York, addressed to the postmaster in the former state, to induce him to violate his official duty, and it was therein argued that the offense was complete in New York when the letter was mailed, and that only in the New York district could the prosecution be constitutionally had; but this court, speaking through Mr. Justice Gray, said: "There can be no doubt at all, if any offense was committed in New York, the offense was continuing to be committed when the letter reached the postmaster in Connecticut."

In that case the offender had done no act out of New York, and the acts performed by him were complete when the letter was delivered at the postoffice in that state; but this court held the crime to be a continuing one. We think the doctrine for stronger reason applies in the present case, for transportation is an es-

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essential element of the offense, and, as we have said, transportation equally takes place over any and all of the traveled route, and during transportation the crime is being constantly committed. It does not follow, from this view of the character of the offense, that a single transportation of goods can be made the basis of repeated separate criminal charges in each of the districts through which the transportation at an illegal rate is had. Take the present case. The charge is of a single, continuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi river and New York of 12 cents for each 100 pounds so transported. This is a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate.

To say that this construction may work serious hardship in permitting prosecutions in places distant from the home and remote from the vicinage of the accused is to state an objection to the policy of the law, not to the power of Congress to pass it. *Hyde v. Shine*, 199 U. S. 62, 78, 50 L. ed. 90, 95, 25 Sup. Ct. Rep. 760. But this is a large country, and the offense under consideration is one which may be constantly committed through its length and breadth. This situation arises from modern facilities for transportation and intercommunication in interstate transportation, and considerations of convenience and hardship, while they may appeal to the legislative branch of the government, will not prevent Congress from exercising its constitutional power in the management and control of interstate commerce. We think there was jurisdiction to prosecute for the offense charged within the western district of Missouri.

It is further contended by petitions that the statutes have no application to a shipment on a through bill of lading from an interior point in the United States to a foreign port. It is alleged that the Elkins law refers to the original interstate commerce act, and that its terms do not include such shipments. Analyzing the 1st section of the act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), it is said that it applies to the following kinds of commerce: (a) interstate commerce; (b) commerce between the United States and an adjacent foreign country; (c) commerce between places in the United States passing through a foreign country; (d) commerce from the United States to a foreign country, only while being transported to a point of transshipment; (e) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign country. And it is contended that § 6, as amended (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), does not require the filing of through export tariffs.

The purpose of Congress to embrace the whole field of inter-

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state commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of § 1 of the original act of 1887, and in the declaration of the scope and purpose of the act, declared in its title. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 211, 40 L. ed. 940, 944, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666. There is no attempt in the language of the act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading. Take the present case. The through rate is obtained by adding the ocean rate to the inland rate. There is no contractual relation between the railroad carrier and the ocean carrier. The ocean rate is uncertain and variable, depending upon time of sailing and available space. The accommodation for ocean shipment was obtained by the shipper and by it made known to the inland carrier. We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment. This construction is reinforced by the broad provisions of § 6 of the act as to publishing schedules, showing rates, fares, and charges, and filing the same with the Interstate Commerce Commission. That such rates, notwithstanding through bills of lading, were subject to the provisions of the act, was held, upon full consideration, and rightfully, as we think, by the Interstate Commerce Commission. *Re Tariffs on Export & Import Traffic*, 10 Inters. Com. Rep. 55.

It is contended that the act, as construed by the circuit court of appeals, makes it conflict with art. 1, § 9, par. 5, of the Constitution, which provides: "No tax or duty shall be laid on any articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

The petitioner contends that to permit a statute to have such application to articles intended for foreign export is to place a burden on the exercise of this right, because, before the shipper can lawfully send his goods abroad, and before the carrier can lawfully accept them, there must be a compliance with the es-

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established rate on file with the Interstate Commerce Commission. This rate is subject only to be changed as provided by law; and this can be done without notice to the exporter and regardless of his power to comply with the legal rate and meet the competition at the seaport and the conditions of foreign markets. These things, it is said, place a distinct burden upon export trade, and therefore come within the constitutional prohibition. But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and, unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition. *Cornell v. Coyne*, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383.

The regulations of interstate commerce provided by the statute now under consideration are within the acknowledged power of Congress under the interstate commerce clause of the Constitution. There is no attempt to levy duties on goods to be exported, and the mere incidental effect in the legal regulation of interstate commerce upon such exportations does not come within this constitutional prohibition.

Nor do we think there is any more force in the contention that this legislation amounts to a preference of ports of one state over those of another within the meaning of the constitutional provision under consideration. This provision was intended to prevent legislation intended to give, and having the effect of giving, preference to the ports of one state over those of another state. It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one state more than those of another, cannot be construed as a violation of this constitutional provision. *South Carolina v. Georgia*, 93 U. S. 4, 13, 23 L. ed. 782, 784; *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 433, 15 L. Ed. 435, 438.

It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

In the Elkins act, Congress has made it a penal offense to give

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or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Sec. 6, 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158. There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Nor do we find anything in the provisions of the statute inconsistent with this conclusion, in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law.

It may be, as urged by petitioner, that this construction renders impossible the making of contracts for the future delivery of such merchandise as the petitioner deals in, and that the instability of the rate introduces a factor of uncertainty, destructive of contract rights heretofore enjoyed in such property. This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the law-making branch of the government. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 399, 50 L. ed. 524, 26 Sup. Ct. Rep. 272. It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done. But, as we have said, such considerations address themselves to Congress, not to the courts. It is the province of the judiciary

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to enforce laws constitutionally enacted, not to make them to suit their own views of propriety or justice.

The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.

If the shipper sees fit to make a contract covering a definite period, for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law.

The right to charge other than the published rate because of a contract alleged to have provided for the rate in force at the time, but, owing to changed conditions, subsequently becoming inadequate to provide for the payment of the published rate, was dealt with by this court in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, *supra*, where a contract for the purchase and carriage of coal at its inception produced the established rate to the carrier, which it subsequently failed to do. This court, speaking through Mr. Justice White, said:

"Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity, stipulating for the payment of a fixed price in the future, and thereby acquiring the power, during the life of the contract, to continue to execute it, although a violation of the act to regulate commerce might arise from doing so."

It is alleged that the indictment is insufficient, in that it fails to set out the kind of device by which traffic was obtained, and of what the concession consisted, and how it was granted. Authorities are cited to the proposition that, in statutory offenses, every element must be distinctly charged and alleged. This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal

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for his protection against further prosecutions, and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity of time, place, and circumstances. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars. *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934. But an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

And in *Ledbetter v. United States*, 170 U. S. 606, 612, 42 L. ed. 1162, 1164, 18 Sup. Ct. Rep. 774, 776, Mr. Justice Brown, speaking for the court, said:

“Notwithstanding the cases above cited from our reports, the general rule still holds good that, upon an indictment for a statutory offense, the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.”

In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.

Had it been made by demurrer or motion, and overruled, it would not avail the defendant, in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in which the offense charged was committed. U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720; *Connors v. United States*, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951.

There can be no doubt that the accused was fully advised of, and understood, the precise facts which were alleged to be a violation of the statute.

As we interpret this law, it is intended, among other things, to prohibit and punish the receiving of a concession for the transportation of goods from the duly filed and published rate. Each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, are distinctly charged in the indictment, and include the fixing of the published rate at 23 cents per 100 pounds; the changing of the rate and the new publication at 35 cents per 100 pounds; the knowledge of this change on the part of the shipper, and the carriage of the goods over a described route at a concession of the difference between the published and the contract rate,—all these facts being stated, the

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indictment is clearly sufficient. Whether it was necessary to charge actual knowledge of the change of rate on the shipper's part is a question not involved in this case, as the indictment charges such knowledge, and the facts stipulated show that the shipper knew of the establishing of the new rate when the goods described in the indictment were shipped.

It is again contended that the submission in the trial court of the question of whether there was a device to avoid the operation of the act and to obtain the transportation at the less rate was prejudicial to the petitioners, as such issue was not within the agreed facts upon which the case was tried.

It is true, as we have held in another part of this opinion, that no device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense outlined in the statute, and that any means by which transportation by a concession from the established rate was had is sufficient to work a conviction. Hence this charge was not prejudicial to the petitioner.

It is contended by the petitioner that there is nothing in the facts found in this case to show any intentional violation of the law; that, on the contrary, the petitioner believed itself to be within its legal rights in insisting upon the performance of its contract, and maintained in good faith that the interstate commerce act did not and could not interfere with it, and that the statute had no application to a shipment of goods for exportation in the manner shown in this case. While intent is, in a certain sense, essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. In this case the statutes provide it shall be penal to receive transportation of goods at less than the published rate. Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law, is a question not decided, because not arising on this record. The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required. 1 Bishop, Crim. Law, 5th ed. § 343. A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well-settled principles. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

Finding no error in the judgments of the Circuit Court of Appeals, the same are affirmed.

Mr. Justice Moody took no part in the disposition of this case.

TERRY *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, Sept. 9, 1908.)

[62 S. E. Rep. 249.]

Carriers—Carrier as Warehouseman—Actions—Burden of Proof.*—

In an action against a railroad for failure to deliver a parcel deposited in its parcel room, plaintiff need not show that its loss was due to the company's negligence.

Same.—A carrier acted as a warehouseman in receiving goods in its parcel room for safe-keeping, and had a right to limit its liability to \$10 in case of loss of the goods, so that a receipt containing such limitation was binding upon the owner, and limited his recovery to that amount.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. O. Purdy, Judge.

Action by C. P. Terry against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

J. B. Atkinson, for appellant.

H. L. Bomar, for respondent.

WOODS, J. In this action of claim and delivery, the plaintiff recovered judgment in a magistrate court for the possession of a suit case and contents, or \$70, the value thereof, in case a delivery could not be had. The judgment of the magistrate was affirmed by the circuit court. The facts upon which the appeal turns were not in dispute.

The defendant kept at its Spartanburg station a room where it received packages for safe-keeping. It there received from plaintiff the suit case, and issued to him a check or receipt of which the following is a copy: "Form 240. Southern Railway Co. Package room owner's duplicate check. — Station. Issued — M. —, 196 —. No. C43101. 10 cents each 24 hours or fraction thereof." These stipulations were printed on the back: "When a parcel is delivered to package room, this stub must be detached and delivered to owner, which must be surrendered to agent before package can be obtained. The party accepting this check hereby agrees, in consideration of the low rate at which it is issued, that no claim in excess of ten dollars (\$10.00) shall be made against the railroad company for loss of, or injury to, any package, valise, or other article, which may have been deposited with it, and for which this ticket has been issued. W. H. Tayloe, General Passenger Agent." When the plaintiff requested a return of

*See extensive note, 26 R. R. R. 298, 49 Am. & Eng. R. Cas., N. S. 298.

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the case, it could not be found; and the defendant's agents testified that after careful search they were unable to account for its disappearance. There is no authority to be found in any jurisdiction for the proposition submitted by appellant that it was incumbent on the plaintiff to assume the burden of showing the loss was due to the negligence of the bailee. There can be no doubt of defendant's liability. *Fleischman v. So. Ry. Co.*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519.

It is equally clear the liability was limited to \$10 as stated in the receipt. We are not called on to decide whether a common carrier is bound to have a higher and lower freight rate, and express that a limitation of the amount of its liability for goods is in consideration of the lower rate, in order to make a contract for such limitation of liability valid. That point is not involved, for respondent's counsel well concedes the keeping of a room for the deposit of parcels is not a part of the business of a common carrier; and that the defendant, as to packages received therein, contracted as a warehouseman. As such warehouseman in receiving the goods, it had a right to contract for the limitation of the amount of its liability in case of loss, and the receipt expressing such limitation was binding on the owner of the goods. *Piedmont Manf. Co. v. C. & G. R. R. Co.*, 19 S. C. 353; *Dunbar v. Port Royal & R. Ry. Co.*, 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; *Hill v. Ga. C. & N. R. R. Co.*, 43 S. C. 462, 21 S. E. 337; *Cau v. Texas & P. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053.

The judgment of this court is that the judgment of the magistrate be modified by reducing the recovery from \$70 to \$10, the amount of the liability stipulated in the receipt.

POWELL v. PHILADELPHIA & R. Ry. Co.

(Supreme Court of Pennsylvania, April 20, 1908.)

[70 Atl. Rep. 268.]

Carriers—"Passengers"—When Relation Exists.*—The relation of passenger and carrier begins when one intending to become a passenger enters on the carrier's premises, and continues until the passenger knows of his arrival at the place of destination, and has a reasonable time to alight and leave the premises.

Same.*—Where a passenger alights from a train, crosses the track to a station on the other side to meet a friend waiting for her, and in so doing crosses a highway, she does not cease to be a passenger because she had passed over such highway.

Same—Use of Station.*—Where a passenger after alighting from a train enters the station to wait for a friend, she is entitled to use the station for a reasonable time.

Same.—Where a passenger, after alighting from a train, enters the station to wait for a friend, and, after leaving the station, is compelled to walk along a dark path very close to the track, and is injured by a passing train, she may recover if she used reasonable care to avoid injury.

Appeal from Court of Common Pleas, Bucks County.

Action by Elizabeth H. Powell against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

On a rule for a new trial, the court filed an opinion in which the facts were stated to be as follows: At about 6:40 o'clock on the evening of November 29, 1905, the plaintiff, Elizabeth H. Powell, accompanied by her friend, Miss Gaunt (now Mrs. Engle), arrived at Langhorne station on a train from Philadelphia. They both alighted in safety on the temporary cinder walk or platform on the south side of the railroad, then operated as a double-track road, running at that point from west to east from Philadelphia to New York City. They were on their way to

*For the authorities in this series on the question whether a person may be a railway passenger before he boards a train or street car of the carrier, see first foot-note appended to *Karr v. Milwaukee, etc., Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623, where all those preceding it are collected; *Illinois Cent. R. Co. v. Cotter* (Ky.), 27 R. R. R. 141, 50 Am. & Eng. R. Cas., N. S., 141.

For the authorities in this series on the question whether a person may be a railway passenger after he alights from the train or street car of the carrier, see foot-note appended to *Payne v. Illinois Cent. R. Co.* (C. C. A.), 26 R. R. R. 635, 49 Am. & Eng. R. Cas., N. S., 635, where all those preceding it are collected; *Blomsness v. Puget Sound Elec. Ry.* (Wash.), 26 R. R. R. 640, 49 Am. & Eng. R. Cas., N. S., 640.

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visit at the house of Edward Palmer, who lived at Langhorne, north of the railroad, and who was to meet them at the station with a carriage. The passenger station house was on the north side of the railroad. It had been located for many years at the foot of Station avenue, a street running in a northerly direction to Langhorne borough. About three weeks prior to this date the station had been moved about 125 feet to the east towards Bellevue avenue, the main street crossing the railroad at about right angles, and running in a northerly direction into Langhorne borough. On the north side of the railroad the Langhorne and Bristol street railway ran from Bellevue avenue in a westerly direction along or near the defendant's land, and parallel with its tracks, for several squares to the west of the passenger station, where it crosses the railroad tracks to the south by an overhead bridge. The street railway stopped its cars at the foot of Station avenue, opposite the railroad station, to let off and take on passengers. The street railway maintained a small platform at this place for the accommodation of its passengers, but no waiting room. Street car passengers intending to take the railroad trains used the railroad's waiting rooms until the departure of their trains, and railroad passengers who desired to reach their destination by means of the street railway likewise used and remained in the defendant company's waiting rooms until the arrival of the next street car. There was no agreement between the defendant company and the street railway as to such use. The waiting rooms were so used by the passengers of both companies for the purposes aforesaid by the permission of the defendant company, at least it does not appear that any objection was made by the defendant company to such use since the street railway was in operation, about 10 years. As said before, Miss Powell and her friend, Miss Gaunt, alighted on the platform in safety. It was a dark, rainy, stormy night. There was no shelter for passengers on the south platform except a small open shed. Miss Powell had been at Langhorne several times before and had used the waiting rooms, but she had not been at Langhorne since the passenger station had been moved. Miss Gaunt had been a frequent visitor at Langhorne, and was well acquainted with the use of the waiting rooms, but had not been there since the station had been removed. They could not reach Mr. Palmer, who lived north of the railroad, without crossing the tracks. They could not cross from the point where they were on the platform to the waiting rooms on the north side because of an iron picket fence between the east and west bound tracks, extending from a point west of the station to the line of Bellevue avenue, a public street crossing; the gates in front of the station being closed. They walked on the cinder walk to Bellevue avenue over the public street crossing to the north side of the railroad, at the end of the cinder walk, which led to the station and waiting rooms,

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about 190 feet west of Bellevue avenue. At this point they were as near to the street car line as they were at the station waiting rooms. They could have proceeded directly to Mr. Palmer's by the public streets, or they could have gone to the public licensed hotel opposite the street to wait for a car. They, however, did not do so. They took the newly laid cinder walk or platform to the railroad station. They entered the waiting room and at once passed through it to the back door to see whether Mr. Palmer was there with a carriage. It was through the back door that passengers usually took their carriages before the station was moved. They found the door was locked. They looked through the windows, and found Mr. Palmer was not there. They then went to the booth and telephoned to Mr. Palmer to know what to do. He told them to sit down and wait. In a short time Mr. Palmer arrived to take them home in the street car. Their purpose of using the waiting room was to meet Mr. Palmer in the first place, and afterwards to await his arrival to take them home, and to secure shelter from the storm in the meantime. They then waited for the arrival of the next car which was due at 7:40. On the arrival of the street car Mr. Palmer, the plaintiff, and Miss Gaunt, with a number of others, were waiting there for the same purpose. They all passed down a little bridge from the elevated temporary platform in front of the waiting room to the temporary cinder walk laid along the tracks where the old platform had been taken up the day before. It was while they were passing along this walk to meet the street car that Miss Powell was struck by a passing express train from the east and was injured. During this period the waiting rooms were open for the use of the defendant's passengers. Miss Powell held a return ticket to Philadelphia.

Argued before MITCHELL, C. J., and BROWN, MESTEZAT, ELKIN, and STEWART, JJ.

Wm. C. Ryan and Henry D. Paxson, for appellant.

Henry A. James and Howard Cooper Johnson, for appellee.

ELKIN, J. After careful consideration, we have concluded that the first assignment of error must be sustained. Whether the plaintiff remained in the waiting room for an unreasonable length of time so as to become a loiterer or mere licensee was, under the circumstances of this case, a question of fact, to be determined by the jury. The learned trial judge in his opinion overruling the motion for a new trial, and for judgment notwithstanding the verdict states that this was a question for the jury and that it was so submitted, but upon an examination of the charge it is clear that this question was not submitted to the jury with instructions for them to determine this fact. On the other hand, the jury were instructed that, "according to the view which the court takes of that situation, the court will in-

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struct you that her rights as a passenger had not ceased." This had reference to the exact question whether she had remained at the Station an unreasonable length of time, and it can only be construed as a binding instruction to the jury. This binding instruction was followed by a general discussion of the facts relating to this particular question, but nowhere does it appear that any direction was given to the jury to determine this exact question. The effect of the charge in this respect can only be considered as binding instructions upon the question of reasonable length of time, and therefore the jury were not left to determine whether, under the circumstances, she had remained an unreasonable time at the station. We do not agree with the contention of the learned counsel for appellant that the relation of carrier and passenger had ceased as soon as plaintiff had been discharged from the train on the south side, and had proceeded from that point to the station house on the north side of the railroad tracks, being the point nearest her destination. This position is predicated on the thought that, in passing from the station house on one side to the station house on the other, the passenger passed over the tracks at a public crossing. If the railroad company had chosen to make a public crossing a convenience for its passengers in going from the station on one side of its tracks to that on the other, it cannot be excused for an act of negligence on the ground that the relation of carrier and passenger had ceased the moment the passenger placed his foot upon the public highway. The general rule is that the relation of carrier and passenger begins as soon as one intending in good faith to become a passenger enters in a lawful manner upon the carrier's premises to engage passage, and that relation continues to exist until the passenger has been made aware of his arrival at the place of destination, and has had a reasonable time to alight from the car and to leave the premises of the carrier. The duty of the defendant company under this general rule in the present case did not cease the moment plaintiff alighted from the train on the south side of the tracks, nor when she proceeded in the direction ordinarily taken by passengers to reach the station on the north side of the tracks, nor did it cease then until she had a reasonable opportunity to make her arrangements to depart. And right here is the pinch of the case on the question raised by the first assignment of error.

Clearly the plaintiff had the right after alighting from the train to proceed to the station on the opposite side of the tracks to await the arrival of a friend who was to meet her there. She was delayed a considerable length of time, and for the reason stated in the testimony she remained in the waiting room until the friend who she intended to visit called for her. In this connection we quite agree with the suggestion made by the learned counsel for appellant that it was no part of the duty of the railroad company to furnish a waiting room for the intending passengers of a street

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railway company with which the railroad company had no connection, and, if it clearly appeared that the only purpose of the plaintiff after alighting from the train at the south side of the tracks was to go to the station on the north side for the purpose of awaiting the arrival of a street railway car on which she intended to become a passenger, there could be no recovery because the relation of carrier and passenger would, under these circumstances, have ceased to exist before the injury occurred. But we do not so understand the testimony on this branch of the case. The plaintiff went to the station by the ordinary route, either to meet her friend or await his arrival in order to accompany her to her place of destination. The friend who was to meet her at the station might have walked, or even driven in a carriage, or come as a passenger on the street railway, and the manner of his coming would in no way affect her rights as a passenger of the railroad company. Under these circumstances the plaintiff had a right to make use of the waiting room of the defendant company for a reasonable length of time, and what was a reasonable length of time was a question of fact, to be determined by the jury. It was the duty of the court to instruct the jury to first determine this question before proceeding to inquire into the alleged negligence of the defendant company, because the right to recover at all depended upon the determination of this question by the jury. If it should be determined that plaintiff had remained at the station an unreasonable length of time before her departure, it would necessarily follow that the relation of carrier and passenger had ceased, and there could be no recovery for an injury subsequently sustained. As we view the testimony, the question of negligence was too broadly submitted to the jury. It was not negligence on the part of the defendant company to run the train which caused the injury on its own tracks and at the usual rate of speed for that train. The question of signals, headlights, and other incidental matters connected with the running of the train, about which some testimony was furnished at the trial, has no connection with this case. The negligence, if any, of the defendant company is in no manner connected with the running of the train which caused the injury. It was the duty of the defendant company to provide safe means of access to and departure from its station for the use of passengers, and the plaintiff in the present case had a right to assume that the means of ingress and egress were reasonably safe. It was the duty of the defendant company to make and maintain the walk in a reasonably safe condition, and if, on the night of the accident, the walk was torn up or covered with obstructions which interfered with its proper use, or which caused the plaintiff to walk too close to the railroad tracks in order to avoid the obstructions, and if this condition of the walk was the proximate cause of the injury, there can be a recovery of damages for the injuries thus sus-

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tained. Again, it was the duty of the defendant company to keep the walks and approaches to the station properly lighted at night or when required. This duty was more imperatively demanded of the defendant company in the present case because of the close proximity of the walk to the railroad tracks, which necessarily made it somewhat dangerous. As we view it, there are only two questions of negligence to be submitted to the jury; that is, was the walk reasonably safe for the use intended and was it sufficiently lighted, and, if not, was failure to perform these duties the proximate cause of the accident?

It was the duty of plaintiff to use reasonable care in order to avoid danger. She was charged with notice that the defendant company had a right to run its trains on its own tracks at any time it suited its purpose to do so, and that a train might pass along while she was on the walk, and the duty rested on her to use reasonable care in order to avoid danger to her person. If she walked too close to the railroad tracks without looking ahead and without exercising such reasonable care as a prudent person should exercise under the circumstances and was injured by reason of her own neglect, clearly there could be no recovery. Under the circumstances, however, we have concluded that this question was also for the jury.

Judgment reversed, and a venire facias de novo awarded.

CLARKE v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, June 17, 1908.)

[111 S. W. Rep. 344.]

Carriers—Carriage of Passengers—Existence of Relation—Passenger.*—Plaintiff assisted the train crew in making up a freight train, and got onto the train when it left toward his home. He knew that the train did not carry passengers. He paid no fare, offered none, and none was demanded. At various stops he assisted in loading and unloading freight, but did not claim that the conductor requested him to do so, though he said that the conductor knew what he was doing and did not object, and was present when one of the brakemen furnished him with a pair of overalls to prevent soiling his clothes. At a certain station he was directed by the conductor to uncouple the engine from a freight car so that the engine might go down on a switch and get another car. In attempting to make the coupling plaintiff was injured. Held, that plaintiff was not a passenger.

Master and Servant—Employee—Existence of Relation—Employment of Trainmen by Conductor.†—The train had a full crew, consisting of the engineer, fireman, conductor, and three brakemen, and there was no special need of plaintiff's services. Held, that plaintiff was not an employee of the company; for, while a conductor has implied authority to employ assistance if a brakeman is absent and the proper and safe management of the train so requires, or if extra labor is needed in cases of sudden emergency, he is not authorized to employ servants to assist in the operation of the train under ordinary conditions.

Railroad — Trespasser — Volunteer.—Plaintiff was performing duties with the knowledge and consent of persons who had at least the apparent right to request his assistance, so he was not a trespasser, but might properly be treated as a volunteer.

Same—Duty of Company to Volunteer.†—The only duty owed by the company to plaintiff as a volunteer was to exercise ordinary care to prevent injuring him.

Same—Actions—Evidence—Sufficiency.—In an action by a volunteer for injuries received in attempting to make a coupling, evidence held insufficient to show failure of the engineer to exercise ordinary care in view of plaintiff's failure to show that the engineer received his signal to stop, or that he could have stopped the engine in time to prevent the accident if he did receive the signal, or that the movement of the train was unusual or unnecessary.

*See first foot-note appended to Louisville & N. R. Co. v. Cottengim (Ky.), 25 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659.

†For the authorities in this series on the subject of the care due from railroad companies to volunteers performing services for them, see second foot-note appended to Atlanta, etc., R. Co. v. West (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548, where all those preceding it are collected.

Clarke v. Louisville & N. R. Co

Appeal from Circuit Court, Nicholas County.

"Not to be officially reported."

Action by Willie Clarke against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. J. Osborne and *W. J. Osborne*, for appellant.

Benjamin D. Warfield and *E. M. Dickson*, for appellee.

CARROLL, J. The appellant at the time he received the injuries complained of was 18 years of age. His foot was crushed by being caught between the couplers in a train. Averring that the injuries he received were caused by the negligence of the employees of appellee in operating the train, he brought this action to recover damages. Upon a trial, and at the conclusion of the evidence offered in behalf of appellant, the lower court directed the jury to return a verdict in favor of appellee. So that the only question we are called upon to consider is whether or not the evidence introduced was sufficient to authorize a submission of the case to the jury. In the disposition of this question, it will be necessary to relate with some detail the facts.

On the day he was injured Clarke went to Maysville, Ky., on a passenger train. Late in the afternoon he went to the depot for the purpose of returning to his home upon a freight train that left Maysville for Paris about 5 o'clock. Arriving at the depot some 20 minutes before the freight left, he assisted the train crew, with whom he was acquainted, and with the knowledge of the conductor, in making up the train, coupling and uncoupling cars, and performing such other duties as brakemen ordinarily discharge. He did not ask permission of the conductor to ride on the train, nor did the conductor ask him if he was going to ride, nor was anything said between them concerning this matter. But, when the train left Maysville, he got on it, and soon after it left the depot he went into the caboose where the conductor and the train crew were seated. The train had its full complement of men, consisting of the engineer, fireman, conductor, and three brakemen. Between Maysville and Park Hill, at which last-named point the injury occurred, the train stopped at several stations for the purpose of unloading and loading freight, and at each of these places Clarke assisted the trainmen. He does not state particularly that the conductor requested him to assist the crew in loading and unloading freight, but does say that the conductor was present at each station, and did not object to his assistance or request him to desist. He also testifies that in the presence of the conductor one of the brakemen furnished him a suit of overalls to wear, so that he might not injure or soil his clothes in handling the freight. He did not pay or offer to pay any fare, nor was any fare demanded of him. When the train reached Park Hill, a station on the road, Clarke was

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directed by the conductor to uncouple the engine from the freight car next to it, so that the engine might go down on a switch some 200 yards distant, and get a couple of cars that they wanted to put into the train. When the engine started after the cars Clarke, in connection with one of the brakemen, got in the engine cab and rode down to the point where the cars were standing on the side track. He says he was directed by the conductor to go with the engine and assist in getting the cars out. When the engine reached a point some 25 feet from the loaded cars, Clarke got out of the cab, and walked back to couple the tender to the end of the nearest car. The coupling knuckles on the car were closed, and the tender bumped its coupling knuckle into the coupling knuckles of the freight car without making the coupling. Clarke then signaled the engineer to pull away from the freight car, which he did, until there was a space of some 10 feet between the end of the tender and the car. After the engine had pulled away, Clarke undertook with his hand, and finally with his foot, to open the coupling on the freight car, so that the tender could be coupled to it. While in the act of opening the coupler with his foot, the engine backed in, catching his foot between the couplers, injuring it to such an extent as to make necessary the amputation of his leg between the ankle and the knee. Counsel for appellant contends, first, that at the time of his injury Clarke was a passenger and entitled to sue and recover as a passenger for injuries sustained; and, second, that, if he was not a passenger, he was an employee, and entitled as such to maintain the action and recover damages.

The question as to when a person who is not riding on a passenger train, or a train upon which passengers are permitted to ride, is entitled to the rights that attach to a passenger, has been considered by courts of last resort in a number of states, including our own court, and different views are taken as to when and under what circumstances the relation of passenger is created. But we do not think that any of the elements necessary to constitute Clarke a passenger, or to fix the liability of the company upon the basis that he was a passenger, exist in this case. There is no pretense that the train upon which he was riding had any accommodation for passengers, or that passengers were ever carried upon it, or that he asked or was given consent by the conductor or any other person to ride as a passenger, or that he tendered or offered to tender his fare as a passenger. On the contrary, Clarke knew that the train did not carry passengers, and that he was not riding on it as a passenger, except in the sense that he was being carried from one place to another. The mere fact that he was riding by the invitation or with the knowledge and implied consent of the conductor did not under the facts of this case convert him into a passenger in the ordinary and legal acceptation of the term. We do not deem

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it necessary in the consideration of this case to point out the conditions under which a person riding upon a freight train may become a passenger or to define the authority of the conductor of a freight train relative to permitting persons to take passage upon it. The facts make it so apparent that Clarke at the time he received the injury complained of was not a passenger that we will not do more than cite the following authorities in which different phases of this question are illustrated: *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187, 4 Am. Rep. 267; *L. & N. R. Co. v. Thornton*, 58 S. W. 796, 22 Ky. Law Rep. 778; *Dalton v. L. & N. R. Co.*, 56 S. W. 657, 22 Ky. Law Rep. 97; *Skirvin v. L. & N. R. Co.*, 100 S. W. 308, 30 Ky. Law Rep. 1208; *B. & O. S. W. R. Co. v. Cox*, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583; *Thompson on Negligence*, §§ 2666, 3326; *L. & N. R. Co. v. Hailey*, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549; *Eaton v. Delaware, Lackawanna, etc., R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *L. & N. R. Co. v. Scott's Adm'r*, 56 S. W. 674, 22 Ky. Law Rep. 30, 50 L. R. A. 381; *C., N. O. & T. P. Ry. Co. v. Jackson*, 58 S. W. 526, 22 Ky. Law Rep. 630; *Elmore v. Sea Board Air Line R. Co.*, 131 N. C. 569, 42 S. C. 989.

Nor can Clarke at the time of his injury be considered as an employee of the company. The train had a full crew, there was no emergency, and no special need for the services of Clarke. The conductor under the circumstances had no authority to and did not employ him to assist as a brakeman. The general rule is that where a brakeman is absent, and the proper and safe management of the train so requires, and in cases of sudden emergency demanding extra labor, it is within the implied authority of the conductor to employ assistance; but all the authorities agree that, except under the conditions indicated, the conductor is not authorized to employ agents or servants to assist in the management or operation of the train. *Sloane v. Railroad Co.*, 62 Iowa, 728, 16 N. W. 331; *Railway Co. v. Propst*, 83 Ala. 518, 3 South. 764; *Eason v. Railway Co.*, 65 Tex. 577, 57 Am. Rep. 606; *McDaniel v. Railroad Co.*, 90 Ala. 64, 8 South. 41; *Elliott on Railroads*, § 302; *Church v. Chicago R. Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861. Neither can it be said with propriety that at the time of the accident he was a trespasser. He was performing duties with the knowledge and consent of the persons who had at least the apparent right to request his assistance. So that we think he may properly be treated as a volunteer. In *Thompson on Negligence*, § 4680, it is said: "A person who volunteers to assist the servant of another, without being employed so to do by that other, is deemed to assume all the ordinary risks incident to the situation. His position is that of a volunteer, and is analogous to that of a trespasser or bare licensee. He takes things as he finds them, and in case of his being injured, unless the injury occurs under such circumstances as to create a liability if

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he were regarded as a trespasser, intruder, or bare licensee, he cannot recover damages from the master of the servant whom he had volunteered to assist. If, after discovering such volunteer has placed himself in a position of danger, even through his own negligence, the servant fails to exercise reasonable care to avert injury, the latter will be liable. This liability does not rest on any contract obligation, but on a general duty not to inflict a wanton or willful injury on another." To the same effect is *Elliott on Railroads*, § 1305; *Evarts v. St. Paul Ry. Co.*, 56 Minn. 141, 57 N. W. 459, 22 L. R. A. 663, 45 Am. St. Rep. 460; *L. & N. R. Co. v. Pendleton*, 104 S. W. 382, 31 Ky. Law Rep. 1025. Considering the matter from this standpoint, and treating Clarke as a volunteer, the only duty that the company owed under the facts of this case was to exercise ordinary care to prevent injury to him. With the knowledge of the engineer and by the direction of the conductor, Clarke was engaged in an effort to couple the engine to the cars, and, while in the performance of this act, the engineer was obliged to exercise ordinary care to prevent injuring him. So that the point upon which this case must turn is whether or not the engineer exercised this degree of care. If he did, the company was not liable, and the ruling of the trial court was proper. On the other hand, if he did not, the case should have gone to the jury. In the disposition of this question, we are not concerned in anything that took place before the arrival of the train at Park Hill, or on other previous occasions, as for the purpose of this case we may assume that at Park Hill Clarke for the first time volunteered to perform any duties in connection with the train. In order that the facts as to the pivotal point in the case may be clearly understood, we will state the testimony as to what took place.

Clarke's evidence is as follows: "Q. How close was the tender to the two loaded cars when you got out of the cab? A. About 35 or 40 feet. Q. What did you do after getting out of the engine cab? A. I walked along, backing him on back, bringing the engineer back by signals. Q. What signals did you give him? A. Just to back up. Q. What signals did you give the engineer, if any? A. After he came on back, the knuckles were closed, and wouldn't couple. He came on back, and hit and made a bump, and then had to pull the engine up; had to open the knuckle. I had to pull him up once after the train had bumped and didn't couple. Then the second time I tried to push the knuckles open, and got my foot caught. Q. What signal did you give the engineer, if any, after the engine bumped into the car and didn't couple? A. Gave him the signal to pull up. Q. About how far did he pull up from the end of the first car? A. It wasn't over 15 feet. Q. What did you do then after he pulled up? A. I was trying to open the knuckle. Q. How were you trying to open the knuckle? A. Trying to open it with my hand

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until the train got nearly there. I threw my foot up to try to kick it open. Q. What signals, if any, did you give the engineer from the time he commenced backing in the engine and tender after he first pulled up and before your foot was caught? A. Gave him the signal to stop—shut down. Q. How close was the tender to the loaded car at the time when you gave him that signal? A. About eight or ten feet. Q. What then happened after you gave him the signal to stop? A. He kept on coming back. Q. Then what happened? A. Why, I was trying to couple—trying to kick that knuckle open—and he came back in a jerk, and caught my foot in there. Q. About what distance was the jerk? A. Four or five feet. Q. How were you trying to push open the coupling knuckle? A. With my foot."

Homer Bourne, a witness introduced for appellant, testified, in substance, that he was on top of the box car at the time the coupling was attempted to be made; that he saw Clarke leave the engine cab and start back and come towards the car upon which he was to make the coupling, but did not see him afterwards. He said that the engine came back to make the coupling in the usual way, and did not jar the car on which he was any more than was done in making an ordinary coupling.

Another witness, Riley Payne, said that he saw Clarke and two other brakemen get out of the cab, and that Clarke and the brakemen both gave signals to back the engine. He was within 10 feet of Clarke at the time of the accident, and on the same side of the train, and said that "Clarke got off the cab and signaled back, to come on back; that he came in and aimed to kick the coupling off, and caught his foot; that he did not remember but one effort made to couple the cars;" that there was no change in the speed of the engine from the time Clarke got out of the cab until his foot was caught; that Clarke stepped from the engine and went along with the engine as it backed, and that the engine moved gradually; that the nearest brakeman was about 15 feet behind Clarke, and, before this brakeman came up to where the coupling took place, Clarke went in and attempted to kick the coupling open with his foot, and, just as he kicked the coupling open, the engine came back and caught it.

Tom Payne testified that he was on the box car that the engine intended to couple to; that he saw Clarke get out of the engine cab and signal the engineer to come back; that he did not see any person else giving signals; that the engine backed up to make the coupling; that it missed, and pulled up about 10 or 12 feet, and backed again, and caught Clarke's foot the second time; that Clarke, upon the failure to make the coupling on the first attempt, gave the signal to pull up, and, in obedience to the signal, the engineer did pull up 10 or 12 feet; and that, when Clarke gave the signal to back, the engine was backed.

The foregoing evidence does not establish that the engineer

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knew that Clarke was in a perilous position, nor is it sufficient to show that in backing the engine he failed to exercise ordinary care. It is true that Clarke says he signaled the engineer to stop, but he does not say that the engineer received the signal, or, if he did receive it, that he could have stopped the engine in time to have prevented the accident, or that the movement of the train was unusual or unnecessary. In *C., N. O. & T. P. R. Co. v. Jackson, supra*, a boy 16 years of age while riding on a freight train with the permission of the conductor and with the understanding that he should open a switch was injured. In discussing his evidence that he had signaled the engineer to back the train, the court said: "Appellee's evidence that he signaled the engineer to back the train is no evidence of the fact that he did act upon that signal, as there were four other men connected with the train whose business it was to look after its movements and give necessary signals. He testifies that he gave the signal from the right side of the train, the side upon which the engineer was sitting, and that the engineer was looking back through his window; still that does not prove that the engineer did see him or his signal, but simply shows that, if he cast his eyes where the appellee stood, he could have seen him. If the appellee had been an employee in operating the train, and had given a signal to back it, under the circumstances stated by him, then an inference might be drawn or a presumption indulged that the engineer saw him and acted on his signal. * * * Besides this there is no proof offered by the appellee to show that the jerk which threw him from the train was one that was unusual in the moving of freight trains, or that any unnecessary force was applied to the train which produced the sudden movement designated as a jerk. There was no negligence shown upon which to base a recovery." To entitle Clarke to recover in this case, there must have been some evidence conducing to show that the engineer failed to exercise ordinary care in handling his engine at the time Clarke was injured.

Upon this vital point there is a total failure of proof; and the judgment of the lower court must be affirmed.

MORGAN v. RAINIER BEACH LUMBER CO.

(Supreme Court of Washington, Jan. 5, 1909.)

[98 Pac. Rep. 1120.]

Master and Servant—Injury to Servant—Promise to Repair Defective Place at Future Time.*—A master having promised an employee working on its locomotive to repair a defect in its track though on the return of the section boss, which would be in a few days, the risk of injury to him from the defect prior to return of the boss was on the employer, and not on him.

Master and Servant—Injury to Servant—Promise to Repair—Imminent Danger.*—Whether the track, which the master promised one working thereon on a locomotive to repair on the return of the section boss, was so notoriously bad, and the danger of derailment so apparent and obvious, that one of ordinary intelligence would not have incurred the risk of continuing to work there, so that the employee by continuing to work assumed the risk, is a question for the jury; the evidence not being so definite as to leave no room for two opinions.

Master and Servant—Injury to Servant—Contributory Negligence.—Whether an employee did his work in a manner contrary to orders, dangerous, and contributing to his injury is a question for the jury, on conflicting evidence.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by C. F. Morgan against the Rainier Beach Lumber Company. Judgment for plaintiff. Defendant appeals. Affirmed.

R. S. Eskridge and Philip Tindall, for appellant.

Jackson Silbaugh, for respondent.

FULLERTON, J. The respondent brought this action to recover for personal injuries received by him while in the employment of the appellant as a locomotive engineer. The appellant at the time of the injury was engaged in the business of logging and manufacturing lumber, and owned and operated as a part of its equipment a logging road some two miles in length, having one terminal at Lake Washington, in King county, and the other in the timber towards the east. Midway between the terminals of the road was a switch back formed by two switches some 800 feet apart. In going towards the Lake terminal after passing the first switch the road descended at a 5 or 6 per cent. grade for about 600 feet, when it made a sharp curve to the left and ascended a steep grade to the second switch. In order to ascend this last grade with a loaded train it was necessary that the train have considerable momentum, and it was customary for the en-

*See note at end of case.

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gineer to pass the curve at a speed of about 12 miles an hour. At the time the respondent was injured he was bringing a train load of logs from the timber to the lake. After leaving the first switch the train passed down the grade in safety, and at its usual speed, but when it reached the curve at the bottom of the grade the rails spread under the engine, causing it to leave the track and turn over. In turning over the engine caught the respondent, breaking his leg between the knee and ankle, being the injury for which he sues. It was shown that the track was out of repair at the place of the accident, that the engine had left the track at that point once before when driven by another engineer, and that shortly before the accident a car had left the track at this as well as at another point on the road because of the defective condition of the track. The respondent's evidence further tended to show, and the jury were warranted in finding, that when the car was being replaced at the latter place, which was less than a week before the accident, the respondent complained to the appellant's foreman of the defective condition of the track generally, and the place where the accident occurred particularly, telling him that the track was in need of repair, especially at the latter place. In the same connection he also complained of the condition of the engine, saying that the brakes did not work properly. The foreman answered by saying: That the section boss, who had charge of the roadbed, was away, but would return in a few days, when the track would be gone over and put in first-class condition; that as to the engine the company had ordered a new one, which was then due to arrive, and, as the old one would be discarded on the arrival of the new one, the company did not feel justified in expending anything more in the repair of the old one. The appellant relied on these assurances and kept on with his work when he met with the accident as above recited. At that time the section boss had not returned, nor had any attempt been made to repair the track. At the trial judgment went for the respondent for \$2,500, and this appeal was taken therefrom.

But one contention is made for reversal, namely, that the evidence was insufficient to sustain the verdict and judgment. The appellant concedes the general rule that when the master, or some one acting in his place and by his authority, promises to remedy a defect in the place in which or the instrument with which he requires his servant to work on the complaint of the servant, the servant does not by continuing in the employment assume the risk of injury from the defect, but contends that there is no room under the facts shown in this case for the application of the doctrine. Counsel argue first that the promise was not to repair immediately or within a reasonable time from the making of the promise, but was to repair within a reasonable time after the return of the section boss, which confessedly was not to occur

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until after a "few days" from the time the promise was made, and actually did not occur before the happening of the accident, and consequently the agreement to repair evidenced by the promise never became operative. The authorities are not agreed as to the principle on which the liability of the master rests in this class of cases, yet all of the modern cases agreed that where a servant makes complaint to his master of a dangerous defect in his place of work, or in the appliances furnished him with which to work, and the master makes an unconditional promise to repair the defect, the risk of the defect is cast upon the master until such time as would preclude all reasonable expectation that the promise might be kept, unless the danger from the defect is so imminent that no person of ordinary prudence would risk injury from it. *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 69 Pac. 359; *Shea v. Seattle Lumber Co.*, 47 Wash. 70, 91 Pac. 623; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; 26 Cyc. 1209, and cases there collected. But on whatever ground the liability may be assumed to rest, there can be no distinction in principle, in so far as the liability of the master is concerned, between an unconditional promise to repair and a promise to repair on or after a certain date, or after the happening of a particular event. The failure to repair after being so requested by the servant puts the master in the wrong. To fail to furnish his servant with a reasonably safe place in which, or a reasonably safe appliance with which, to work is a violation of a duty imposed on the master by law. The delay in making the repairs is for his benefit, not that of the servant, and the time within which it will be made is wholly within his control. If therefore he chooses for his own convenience to induce his servant to work in a defective place or work with a defective instrument, his liability must be the same whether he fixes a definite time when he will remove the danger, or whether he leaves that time indefinite.

The cases cited by the appellant to maintain the contrary doctrine are: *Standard Oil Company of Indiana v. Helmick*, 148 Ind. 457, 47 N. E. 14; *Albrecht v. Chicago & Northwestern R. Co.*, 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 653; and *Rice v. Eureka Paper Co.*, 70 App. Div. 336, 75 N. Y. Supp. 49. The first and last of these cases do maintain the principle contended for, but the first was overruled by the Supreme Court of Indiana in the subsequent case of *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; the court using this language: "The case of *Standard Oil Co v. Helmick*, 148 Ind. 457, 47 N. E. 14, is urged upon our consideration as holding a contrary view. It should be noted that the question in that case related to the use of an ordinary crank, applied in the usual way to a square shank on the end of a shaft which revolved a machine in the occasional discharge of candles. The defect complained of was the worn

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condition of the shank, which had been brought about gradually by friction in the use of the crank. The plaintiff put on the crank, and, while engaged in turning the machine, the crank slipped off and precipitated him against a platform, whereby he was injured. The court assigned the Helmick Case to that class to which Meador v. Lake Shore, etc., R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384, Jenney, etc., Co. v. Murphy, 115 Ind. 566, 18 N. E. 30, and Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56, belong, which hold that in the use of simple implements and devices a promise to repair is not available as a defense. What was there said, contrary to the view herein expressed, was unnecessary to a decision of the case, and cannot be accepted as authority in the case at bar. Some expressions in Burns v. Windfall Mfg. Co., 146 Ind. 261, 45 N. E. 188, and probably other of our cases may appear in conflict; but we are satisfied that the better reasons and a decided weight of authority support the law as above stated." The case from the Supreme Court of New York was reversed by the Court of Appeals in Rice v. Eureka Paper Co., 174 N. Y. 385, 66 N. E. 979, 62 L. R. A. 611, 95 Am. St. Rep. 585; that court holding that the promise which the Supreme Court held to be a promise to repair at a fixed time was in fact a promise to repair generally without limitation as to time. The Wisconsin case, while not directly parallel as to its facts, may be said to support the appellant. But the Wisconsin case, if it does not stand alone, is against the great weight of authority. The general rule is that the master, when he promises to repair a defect at a definite and agreed time, takes upon himself the risk from the time of the making of the promise up to and including the expiration of the time specified for its fulfillment.

In McFarlan Carriage Co. v. Potter, *supra*, the servant was injured by a defective saw and saw table which the master had promised to repair "as soon as the job of work that said company was then working on was completed." The servant was injured before the job was completed, and it was argued there, as here, that the time for the execution of the promise had not then arrived. The court held the master liable, using this language in its opinion: "A promise to repair is confession to a breach of duty, and when a master, to right himself, requests and induces a postponement, either for convenience or profit, no principle of justice will lay the burden of delay upon the unoffending servant. The whole question is bottomed upon the wrong of the master, and it is sophistry to argue that the servant, by confiding in the master's promise, for a reasonable time in which to cure the defects, clearly obvious though they be, should be chargeable with having waived the master's duty to him, and assumed the additional risk himself. * * * It is also insisted that the complaint is bad because it shows that the plaintiff's injury was

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received before the job was completed, and before the time for execution of the promise had arrived; the insistence being that the promise to repair, as made, did not begin to operate until the job was completed, and that the shielding period was the reasonable time the plaintiff might rely upon the performance of the promise after the completion of the job. We cannot approve this view. We perceive no sound reason, and none has been suggested, for holding that such a promise has no force till the time arrives for its execution, and that it does not become effective until after it is broken. It is clear, and the view has the support of an overwhelming weight of authority, that a promise to repair is at its best the moment it is made and acted upon."

In *Greene v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785, the servant, a locomotive engineer, had complained to the master of a defect in the engine which he was required to operate, and was promised that it would be repaired at the end of the next trip. Before the end of the trip the servant was injured while operating the defective engine and by reason of the defect. It was held that the servant could recover. Discussing the effect of the promise, the court said: "If a servant, before he enters a service, knows, or afterwards discovers, that the instrumentalities furnished for his use are defective, and understands, or by exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection, and without any promise on the part of the employer that such defects will be remedied, enters or continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have assumed all the risks of the employment thus known. But it is now almost equally well settled that if a servant, who has knowledge of defects in the instrumentalities furnished for his use, gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. * * *

Courts also differ as to the ground upon which this should be placed. Some place it upon grounds of policy and justice, upon a consideration of the unequal situation of master and servant; others, upon the ground that, in such cases, the facts rebut the presumption of a waiver on the part of the servant; others, upon the ground of a contract on the part of the employer, implied from the facts, that, if the servant continues in the service in the meantime, and until the defects are remedied, the employer, and not the servant, will assume the risks. We will not attempt to

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determine which of these is the best or most logical reason for the rule, except to say that the last seems to us very forcible, especially where there is a request to the servant to continue in the service. It is sufficient for us that the rule has generally commended itself to the judicial mind (as it does to us) as founded in sound policy and common justice. If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use, under a promise thereafter to repair it."

In the case of *Roux v. Lumber Co.*, 85 Mich. 519, 48 N. W. 1092, 13 L. R. A. 728, 24 Am. St. Rep. 102, the servant was employed in the master's sawmill. He was working close to beveled gear wheels, which up to the day preceding the accident had been covered. On the day preceding the accident the covering became broken, and at night the servant called the master's attention to the fact. When the servant reached the mill on the morning of the accident, he saw that the defect had not been remedied, and again called the master's attention to it. The master promised to repair it at the noon hour, telling the servant to take care of himself until that hour. Before the noon hour, the servant's clothing caught in the exposed gearing, and his leg was drawn therein and crushed. On appeal from a judgment in his favor, the court said: "It is urged that plaintiff's knowledge of the exposed and dangerous condition of this gearing was equal to that of his employers, and by continuing his work he assumed the risk. This rule of law is not applicable to the circumstances of the present case. The risk to which plaintiff was exposed on the day of the injury was not one ordinarily incident to his employment. The danger was not one existing at the time of his engagement. It was a temporary peril. It did not arise until the day before the injury. In view of the danger, this very machinery had been covered up. Plaintiff, acting as a prudent man should, had, on the evening before, and again on the very morning of the accident, notified defendant of the fact that the gearing was exposed, and defendant had, in recognition of the danger, and of plaintiff's exposure thereto, promised to replace the covering, and instructed the plaintiff to continue his work until noon, when it should be done. There was no voluntary assumption of the risk on the part of the plaintiff. He proceeded under protest. It was defendant's bounden duty, when notified, to recover this gearing. It was postponed to suit defendant's convenience, and not that of the plaintiff." Other cases to the same effect are the following: *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521; *Louisville Hotel Co. v. Kaltenbrum* (Ky.), 80

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S. W. 1163; King-Ryder Lumber Co. v. Cochran, 71 Ark. 55, 70 S. W. 606; Cudahy Packing Co. v. Skoumal, 125 Fed. 470, 60 C. C. A. 306.

In *Andrecsik v. New Jersey Tube Co.*, 73 N. J. Law, 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913, it appeared that a servant in charge of a machine in his master's mill discovered a defect in the machine some time prior to 10 o'clock in the morning, and at that hour complained to the superintendent concerning it. The superintendent, in answer to the complaint, said to him: "You go right ahead with the work. We are overloaded with work, and at the noon hour I will fix this for you." The servant worked until the noon hour without injury. The defect was not remedied at the noon hour, and the servant went to work with the machine without further complaint, knowing that the defect had not been repaired, and was injured at 3 o'clock that afternoon. The court held he could not recover, that the effect of the promise was to cast upon the master the liability from the time of the promise to the time he agreed to make the repairs, but, not having made them at the time agreed upon, to the knowledge of the servant, the risk of injury thereafter was assumed by the servant.

The same doctrine was announced by the Supreme Judicial Court of Maine in the case of *Dempsey v. Sawyer*, 95 Me. 295, 49 Atl. 1035. In the case at bar the respondent was injured prior to the return of the section boss, and prior to the time it was indicated by the master that he would return. These cases therefore support the rule contended for by the respondent, since the time in which the repairs were to be made had not yet arrived. Whether the rule announced by them, to the effect that the liability for the defect terminates at the expiration of the time fixed if the repairs are not then made, is or is not sound, we need not here determine; but it is probable that this rule, like many others pertaining to this class of cases, must be governed largely by the circumstances. Since defects such as were complained of in the case at bar could not have been repaired at an instant, or perhaps without several days' labor, it would be much more rational to hold that the liability continued until such reasonable time after the section boss' return as it would take to make the repairs; but, be this as it may, we are clear that the appellant, by promising to repair the defects in the track on the return of the section boss, took upon itself the liability for any injury to the respondent arising from the defect between the hour of making the promise and the time fixed for the section boss' return, and, as the injury to the respondent happened between those dates, it was liable to respond in damages for that injury.

It is next said that the appellant is excused from liability for

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the reason that the track was so notoriously bad, and the danger of the accident from derailment so apparent and obvious, that no person of ordinary intelligence and prudence would have incurred the risk; but we do not think the evidence upon this question was so definite as to leave no room for two opinions, and, unless it was thus definite, the question was for the jury. The court rightly submitted it to them.

Whether the respondent operated the train in a dangerous manner, and contrary to the orders of the appellant, and whether this manner of operating the train contributed to his injury, were likewise questions of fact for the jury. The evidence being in conflict upon these questions, the right to determine its preponderance was with the jury. The right does not rest with the appellate court.

The judgment is affirmed.

MOUNT, CROW, and RUDKIN, JJ., concur. HADLEY, C. J., and DUNBAR and CHADWICK, JJ., not sitting.

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I. IN GENERAL.

A. GENERAL RULE.

An employee who complains of the danger to which he is exposed by reason of the existence of a dangerous condition or the use of a defective tool or other appliance, but continues to encounter the danger, with knowledge of its character, will not be prevented by the assumption of risk rule from recovering for his personal injuries sustained by reason of exposure to such danger, if he was induced to continue to work under such conditions by a promise made by his employer to repair the defect or otherwise remove the danger complained of, and he sustained his injuries within a reasonable time for the fulfillment of the promise, and the danger was not so great or immediate that a reasonably prudent man would have refused to remain in an employment which exposed him to such peril.

United States.—*Barney Dumping Boat Co. v. Clark* (C. C. A.), 112 Fed. Rep. 921; *Burch v. Southern Pac. Co.* (C. C. A.), 140 Fed. Rep. 270; *Cudahy Packing Co. v. Skoumal* (C. C. A.), 125 Fed. Rep. 470; *Dells Lumber Co. v. Erickson* (C. C. A.), 80 Fed. Rep. 257; *Detroit Crude-Oil Co. v. Grable* (C. C. A.), 94 Fed. Rep. 75; *Highland Boy Gold Min. Co. v. Pouch* (C. C. A.), 124 Fed. Rep. 148; *Homestead Min. Co. v. Fullerton* (C. C. A.), 69 Fed. Rep. 923; *Hough v. Texas & Pac. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Lehigh Valley Coal Co. v. Warrek* (C. C. A.), 84 Fed. Rep. 866; *Northern Pac. R. Co. v. Bab-*

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Alabama.—*Bridges v. Tennessee Coal, Iron & R. Co.*, 109 Ala. 287, 19 So. 495; *Eureka Co. v. Bass*, 81 Ala. 200, 8 So. 216; *Woodward Iron Co. v. Jones*, 80 Ala. 123.

Arkansas.—*King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55, 70 S. W. 606; *Little Rock, etc., R. Co. v. Duffey*, 35 Ark. 602, 4 Am. & Eng. R. Cas. 637; *St. Louis, etc., Ry. Co. v. Triplett*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266.

California.—*Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

Colorado.—*Carleton Min. & Mill. Co. v. Ryan*, 29 Colo. 401, 86 Pac. 279; *Monarch M. & D. Co. v. DeVoe* (Colo.), 85 Pac. 633.

Delaware.—*Boyd v. Blumenthal & Co.*, 3 Penn. (Del. Sup'r Ct.), 564; *Huber v. Jackson & Sharp Co.*, 1 Marv. (Del. Sup'r Ct.), 374; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del. Sup'r Ct.), 525.

Georgia.—*Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33.

Idaho.—*Harvey v. Alturas Gold Min. Co.* (Idaho), 31 Pac. 819.

Illinois.—*Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484; *Chicago, Anderson Pressed Brick Co. v. Sobowiak*, 148 Ill. 573, 36 N. E. 572; *Chicago Bridge & Iron Co. v. Hayes*, 91 Ill. App. 269; *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Chicago, etc., R. Co. v. Travis*, 44 Ill. App. 466; *City of Kinmundy v. Anderson*, 103 Ill. App. 457; *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714; *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393; *Illinois Cent. R. Co. v. Weiland*, 67 Ill. App. 332; *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Odin Coal Co. v. Tadlock*, 216 Ill. 624, 75 N. E. 332; *Parnee Coal Co. v. Boyce*, 79 Ill. App. 469; *St. Clair Nail Co. v. Smith*, 43 Ill. App. 105; *Sattley Mfg. Co. v. Wendt*, 116 Ill. App. 375; *Sendzikowski v. McCormick Harvesting Machine Co.*, 58 Ill. App. 418; *Shickle, etc., Iron Co. v. Glon*, 106 Ill. App. 645; *Simpson v. Weir & Craig Mfg. Co.*, 116 Ill. App. 286; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Swift & Co. v. O'Niel*, 187 Ill. 337, 58 N. E. 416; *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714; *Westville Coal Co. v. Wool*, 96 Ill. App. 616.

Indiana.—*East Chicago Iron & Steel Co. v. Williams*, 17 Ind. App. 573; *Crum v. North Vernon Pump, etc., Co.*, 34 Ind. App. 253; *Indianapolis Union Ry. Co. v. Ott*, 11 Ind. App. 564, 38 N. E. 842, 39 N. E. 529; *Indianapolis, etc., Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824; *McFarland Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Romona Oolitic Co. v. Phillips*, 11 Ind. App. 118, 39 N. E. 96; *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14.

Iowa.—*Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662, 14 Am. Ry. Rep. 575, App. 66; *Buehner v. Creamery Package Co.*, 124 Iowa 445, 100 N. W. 345; *Cowles v. Chicago, etc., Ry. Co.*, 102 Iowa 507, 71 N. W. 580; *Foster v. Chicago, etc., Ry. Co.*, 127 Iowa 84, 102 N. W. 422, 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 14; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa 357; *Lumley v. Caswell*, 47 Iowa 159; *Pieart v. Chicago, etc., Ry. Co.*, 82 Iowa 148, 47 N. W. 1017; *Stoutenburg v. Dow, etc., Co.*, 82 Iowa 179,

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47 N. W. 1039; *Taylor v. Star Coal Co.*, 110 Iowa 40, 81 N. W. 249.

Kansas.—*Atchison, etc., R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484; *Atchison, etc., Co. v. Midgett*, 1 Kan. App. 138, 40 Pac. 995; *McQueen v. Central, etc., R. Co.*, 30 Kan. 689, 1 Pac. 139; *Southern Kan. Ry. Co. v. Croker*, 41 Kan. 747, 21 Pac. 785.

Kentucky.—*Breckenridge Co. v. Hicks*, 94 Ky. 362, 22 S. W. 554; *Bates-Rogers Const. Co. v. Dunn (Ky.)*, 93 S. W. 1032; *Brown v. Levy*, 108 Ky. 163, 55 S. W. 1079; *Reiser v. Southern Planing Mill & Lumber Co.*, 114 Ky. 1, 69 S. W. 1085; *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556, 78 S. W. 172.

Maryland.—*Maryland Steel Co. v. Engleman*, 101 Md. 661, 61 Atl. 314.

Massachusetts.—*Lewis v. New York, etc., R. Co.*, 153 Mass. 73, 26 N. E. 431; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550; *Scullane v. Kellogg*, 169 Mass. 544, 48 N. E. 622.

Michigan.—*Roux v. Blodgett & Davis Lumber Co.*, 85 Mich. 519, 48 N. W. 1092; *Schlacker v. Ashland Iron Min. Co.*, 89 Mich. 253, 50 N. W. 839.

Minnesota.—*Ehmcke v. Porter*, 45 Min. 338, 47 N. W. 1066; *Gibson v. Minneapolis, etc., Ry. Co.*, 55 Minn. 177, 56 N. W. 686; *Gray v. Red Lake Lumber Co.*, 85 Minn. 24, 88 N. W. 24; *Greene v. Minneapolis Railway Co.*, 31 Minn. 243, 17 N. W. 378; *Harris v. Hewitt*, 64 Minn. 54, 65 N. W. 1085; *Lyberg v. Northern Pac. R. Co.*, 39 Minn. 15, 38 N. W. 632; *Nelson v. St. Paul Plow Works*, 57 Minn. 43, 58 N. W. 868; *Rogers v. Chicago Great Western Ry. Co.*, 65 Minn. 308, 67 N. W. 1003; *Rotherberger v. Northwestern Consolidated Milling Co.*, 57 Minn. 461, 57 N. W. 531; *Schlitz v. Pabst Brewing Co.*, 57 Minn. 303, 59 N. W. 188; *Shalgren v. Red Cliff Lumber Co. (Minn.)*, 104 N. W. 531; *Smith v. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358; *Snowberg v. Nelson-Spencer Paper Co.*, 43 Minn. 532, 45 N. E. 1131.

Missouri.—*Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Hyatt v. Hannibal & St. Jo. Ry. Co.*, 19 Mo. App. 287; *Meyer v. Gunlach-Nelson Mfg. Co.*, 67 Mo. App. 389; *Muirhead v. Hannibal & St. Jo. Ry. Co.*, 19 Mo. App. 634; *Nash v. Dowling & Cavanaugh*, 93 Mo. App. 156; *Prophet v. Kemper*, 95 Mo. App. 219; *Studenroth v. Hammond Packing Co.*, 106 Mo. App. 481; *Whaley v. Coleman*, 113 Mo. App. 594.

Montana.—*Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273.

Nevada.—*Taylor v. Nevada-California-Oregon Ry.*, 26 Nev. 415, 69 Pac. 858.

New Jersey.—*Andrecsik v. New Jersey Tube Co.*, 73 N. J. 664, 63 Atl. 718; *Dunkerley v. Webendorfer Machine Co.*, 71 N. J. L. 60, 58 Atl. 94.

New Mexico.—*Lutz v. Atlantic & Pac. Ry. Co.*, 6 N. Mex. 496, 30 Pac. 912.

New York.—*Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979; *Citrone v. O'Rourke Engineering Const. Co. (Sup. Ct.)*, 99 N. J. Supp. 241.

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North Carolina.—*Springs v. Southern Ry. Co.*, 130 N. Car. 186, 41 S. E. 100.

Ohio.—*Union Mfg. Co. v. Morrissey*, 40 Ohio St. 148.

Oklahoma.—*Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okl. 356, 375, 75 Pac. 302.

Pennsylvania.—*Brownfield v. Hughes*, 128 Pa. St. 194, 18 Atl. 340; *Fick v. Jackson (Pa.)*, 3 Pa. Sup'r Ca. 278; *Madara v. Pottsville Iron & Steel Co.*, 160 Pa. St. 109, 28 Atl. 639; *Patterson v. Pittsburg & Connellsville R. Co.*, 76 Pa. St. 389; *Webster v. Monongahela Coal & Coke Co.*, 201 Pa. St. 278, 50 Atl. 964; *Wust v. Erie City Iron Works*, 149 Pa. St. 263, 24 Atl. 291.

Rhode Island.—*Jones v. New American File Co.*, 21 R. I. 125, 42 Atl. 509.

South Carolina.—*Powers v. Standard Oil Co.*, 53 S. Car. 358, 31 S. E. 276.

Tennessee.—*Railroad Co. v. Kenley*, 92 Tenn. 207, 21 S. W. 326; *Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657, 69 S. W. 334.

Texas.—*Galveston, etc., Ry. Co. v. Echols*, 7 Tex. Civ. App. 429, 26 S. W. 1117; *Gulf, etc., Ry. Co. v. Donnelly*, 70 Tex. 371, 8 S. W. 52; *Hillje v. Hettich*, 95 Tex. 321, 65 S. W. 491; *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596, 55 S. W. 362; *International, etc., Ry. Co. v. Turner*, 2 Tex. Civ. App. 487, 23 S. W. 146; *Missouri, etc., Ry. Co. v. Baker*, 35 Tex. Civ. App. 542, 81 S. W. 67; *Southern Pac. Co. v. Leach*, 2 Tex. Civ. App. 68, 21 S. W. 563; *Texas, etc., R. Co. v. Bingle*, 91 Tex. Sup. Ct. 287, 42 S. W. 971.

Utah.—*Miller v. Bullion-Beck, etc., Min. Co.*, 18 Utah 358, 55 Pac. 58.

Virginia.—*Newport News Pub. Co. v. Beaumeister*, 102 Va. 677, 47 N. E. 821; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 N. E. 991.

Washington.—*Crooker v. Pacific L. & M. Co.*, 29 Wash. 30, 69 Pac. 359, 34 Wash. 191, 75 Pac. 632; *Leeson v. Saw-Mill Phoenix*, 41 Wash. 423, 83 Pac. 891.

West Virginia.—*Graham v. Newberg, etc., Co.*, 38 W. Va. 273, 18 S. E. 584.

Wisconsin.—*Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993; *Jensen v. Hudson Sawmill Co.*, 98 Wis. 73, 73 N. W. 434; *Nelson v. Shaw*, 102 Wis. 274, 78 N. W. 417; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337.

England.—*Holmes v. Clark*, 7 Hurl. & Norm. (Eng.), 348, 6 Hurl. & Norm. 937; *Holmes v. Worthington (Eng.)*, 2 Fos. & Fin. 533.

In *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596, 55 S. W. 362, it is held that an employee having knowledge of dangerous defects in his employer's machinery may relieve himself of assumption of the risk therefrom by notifying the master and receiving such assurances as to show an express assumption of the risk by the master, or afford the servant reasonable guaranty that the danger will be removed in time to prevent injury to him.

Note

A railroad employee having notice of defects in equipments or appliances may recover for an injury resulting therefrom, where he is assured by his superior that the defect in question is not dangerous, or that it will be timely repaired, and the employee, in reliance on such an assurance or promise, continues at the work. So held in *Muirhead v. Hannibal & St. Jo. Ry. Co.*, 19 Mo. App. 634.

Where no immediate danger is threatened from the use of a defective appliance, or where it is reasonable to suppose that by great caution and skill the danger from its use may be avoided, and the employee has called his superior's notice to the risk, and has been promised that the defect will be repaired, he may rely upon such promise until such time has elapsed as would show that the promise will not be carried out, or that it has been broken, without assuming the risk from the use of the defective appliance. So held in *Conroy v. Vulcan Iron-Works*, 6 Mo. App. 102.

Obvious Risk.—Although the risk is obvious, the master may still be liable for injuries to the servant, if he has promised to amend the defect or make the place safe, and the servant continues the work in reliance upon such promise. So held in *Dowd v. Erie R. Co.* (N. J.), 12 R. R. R. 368, 35 Am. & Eng. R. Cas., N. S., 368, 57 Atl. 248.

Obviously Dangerous Work Place.—In *Barney Dumping Boat Co. v. Clark* (C. C. A.), 112 Fed. Rep. 921, it is held that an employee has the right to remain in the employment for a reasonable length of time, although the place where he is required to work is obviously dangerous, without assuming the risk from such dangers, when he has been promised by his employer that the place will be made safer, either by repairs or by structural changes which would lessen the danger.

Promise as Circumstance for Consideration of Jury.—In Massachusetts the courts hold that in such cases (general rule cases) it is a question for the jury whether the servant has assumed the risk, and that the promise is a circumstance to be considered by the jury. *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530.

B. VIEW THAT MASTER IS NOT LIABLE IF ACCIDENT
HAPPENS BEFORE EXPIRATION OF TIME
FOR FULFILLMENT OF PROMISE.

But in *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 70 N. Y. App. Div. 336, it is held that where the master promises to make the repairs or remove the danger at a specified time, the employee for whose benefit the promise was made continues to assume the risk from such defect or danger until the time arrives for the fulfillment of the master's promise. This decision is reversed in 174 N. Y. 285, but the court expressly declares that it does not decide this particular question; but in *Citrone v. O'Rourke Engineering Const. Co.* (N. Y. Sup. Ct.), 99 N. Y. Supp. 241, this very point was decided in accordance with the weight of authority, reversing *Rice v. Eureka Paper Co.*, supra.

Note

Reassumption of Risk Pending Fulfillment of Promise—Question for Jury.—When an employee has notified his employer that he will no longer carry a risk once assumed, and is requested by the master to continue in the employment, with the assurance that the defects shall be soon remedied, and the employee then does continue in the employment, it is a question of fact for the jury whether the servant has re-assumed the risk, pending the removal of the defects, or whether it remains upon the master, there being no necessary inference either way. So held in *Dempsey v. Sawyer*, 95 Me. 295, 59 Atl. 1035.

Promise to Repair Machinery as Soon as Job Is Completed.—But in *McFarland Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465, it is held that where a servant is induced to continue work upon a promise of the employer to repair defective machinery as soon as the job engaged on is completed, the master is not relieved from liability for an injury sustained by the employee by reason of the defect because the injury was received before the time of the execution of the promise to repair had arrived. See also, *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14.

C. ILLUSTRATIONS OF GENERAL RULE.

Defective Brake Shoes on Hand Car.—In *Foster v. Chicago, etc., Ry. Co.*, 127 (Iowa) 84, 102 N. W. 422, 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538, it is held that a section hand's assumption of risk from defective brake shoes on a hand car is suspended immediately on the foreman promising him, when he called his attention to their condition, that he would repair them, and the risk is then the master's, as long as the servant may reasonably expect the promise to be performed.

Defective Chain Used in Loading Logs on Cars.—In *Britt v. Carolina Northern R. Co. (N. Car.)*, 50 S. E. 910, 26 R. R. R. 453, 49 Am. & Eng. R. Cas., N. S., 453, it is held that where a servant of a railroad company notified it of the defective condition of a chain used in loading logs on cars, and was promised that the defect would be remedied, and, relying on the promise, remained in the service, he did not assume such risk of injury.

Promises to Furnish Another Hand Car.—In *Boney v. Atlantic & N. C. R. Co. (N. Car.)*, 58 S. E. 1082, 26 R. R. R. 609, 49 Am. & Eng. R. Cas., N. S., 609, it is held that where a servant who was injured while riding on a defective hand car had repeatedly reported it to his superior as defective, and the superior had promised to furnish another, but had failed to do so, there was no assumption of risk.

Insecurely Fastened Boards between Rails of Inclined Tramway at Coal Hoist—Employee Run over by Car.—In *Conroy v. Vulcan Iron Works*, 62 Mo. 35, it appeared that boards placed between the rails of an inclined tramway on which cars ran at a "coal hoist," being insecurely fastened, gave way under a servant of the company owning the same, while he was engaged in the line of his employment in de-

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taching one of the cars while in motion from a wire rope; and he was in consequence run over and injured; that he had discovered the condition of the track two or three days before, and reported the same to his superior officer, but was assured that he would "make the proper repairs," but could "not do everything at once;" and that such timbers were still being used at the time of the casualty. It was held that the servant had the right to presume that the company would take proper steps to secure his safety.

Shortness of Curve of Siding and Its Improper Connection with Main Track—Derailment.—In *Patterson v. Pittsburg & Connellsville R. Co.*, 76 Pa. St. 389, an action against a railroad company for injuries to plaintiff by their negligence, he offered to prove that he was a conductor of one of defendant's freight trains; that it had a siding, on which coal cars were to be run out to empty coal on a platform, and it was his duty as conductor to run out on the siding the coal cars brought with his train; that by reason of the shortness of the curve of the siding and its improper connection with the main road it was dangerous to run the cars on the siding; that he had notified the superintendent and foreman of defendant of such danger and they promised to repair the road so as to avoid it, and requested plaintiff to continue in his employment till the repairs were made; that nothing was done towards making the repairs, and that while plaintiff was running his train on the siding, using due care, the front car, by reason of the shortness of the curve, ran off the track, and plaintiff was thereby injured. It was held that such evidence should have been received.

Working Near Uncovered Cogwheels.—In *Buehner v. Creamery Package Co.*, 124 Iowa 446, 100 N. W. 345, it appeared that the injured employee two days before the accident complained to his foreman about the cogwheels under the table at which he was employed being uncovered, saying that his trousers had got caught in the cogs, and that something ought to be put over them, and the foreman responded that he would get them fixed. Plaintiff testified that he remained in the employ of defendant, exposed to the danger involved in the uncovered condition of the cogwheels, because he thought, from what the foreman said to him, that they would be covered, and there was a reasonable time after such complaint within which protection against such danger from the cogwheels might have been furnished. It was held that plaintiff did not assume the risk after such promise.

Miner Injured—Failure to Timber Shaft.—In *Momarch M. & D. Co. v. DeVoe* (Col.), 85 Pac. 633, it appeared that a miner noticed the dangerous condition of a shaft because of its not being lined with timbers for about twenty feet, and called the attention of the superintendent of the mine to it, two days previous to an accident in which the miner was injured, and the superintendent promised to have it timbered right away. It was held that the miner did not assume the risk of injury from failure to timber the shaft.

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Injury to Operator of Edger in Sawmill—Cracked Saw.—In *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55, 70 S. W. 606, it appeared that one employed to operate an edger in a sawmill discovered that the saw was cracked and reported its condition to the foreman, who told him to run it until noon, when he would have it repaired, and he continued to run it, and was injured. It was held that after such promise the employee was relieved of the risk of operating the edger unless the danger was so obvious that no person of ordinary prudence would have continued to operate it without assuming the risk.

Clogging of Mill Rollers Caused by Defective Hopper—Defective Lights—Hand Caught between Rollers.—In *Stoutenburg v. Dow, etc., Co.*, 82 Iowa 179, 47 N. W. 1039, it appeared that plaintiff was employed in the roller mills of defendant; that at about half past five o'clock on the morning of September fifth, the break or grinding rollers became clogged and plaintiff undertook to clean out the material while the rollers were moving, and his left hand was caught between the rollers. The evidence was such as to warrant the jury in finding that the clogging of the rollers was due to a defective hopper from which the material was fed to the rollers, and that plaintiff had complained of the defective nature of the hopper to the manager of the mills, and was given assurance that the same would be removed and trouble remedied, but this was not done. The mill was lighted by electric lights during the night and until five o'clock in the morning, when yet dark, and from that hour until daylight plaintiff was obliged to work by gaslight, which was so dim as compared with the electric light as to render plaintiff's duties about the machinery more dangerous. Plaintiff also complained of this change of lights, and was promised that the electric lights should be continued until daylight, but this was not done. It was held that a verdict for plaintiff for damages for his injury was warranted by the evidence.

D. RATIONALE OF RULE.

1. Master Assumes Added Risk.

Where a servant continues to use a defective appliance because of a promise on the part of the master that the defect will be repaired, the master himself assumes the added risk, and the servant is relieved therefrom for a reasonable length of time after such promise. So held in *Atchison, etc., Ry. Co. v. Sledge* (Kan.), 74 Pac. 1111, 10 R. R. R. 229, 33 Am. & Eng. R. Cas., N. S., 229.

In *Chicago, Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572, it is said in the opinion: "The reason for this exception may be stated to be, that when the master has knowledge of the defects and promises to repair the same, he impliedly requests the servant to continue the work, and promises that he, the master, will take upon himself the responsibility of any accident that may occur during that period: *Holmes v. Clark*, 7 Hurl. & Norm. (Eng.), 348, 6 Hurl & Norm. 937, cited approvingly in *Missouri Furnace Co. v. Abend* (107 Ill. 44), *supra*."

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Broken Machinery Guard.—The facts in *Holmes v. Clark*, 7 Hurl. & Norm. (Eng.), 348, 6 Hurl. & Norm. 937, were that when plaintiff entered into defendant's service the machinery was protected by an iron guard, but after he had been some months in the service the guard was broken, either by accident or decay, and the machinery remained unprotected. Plaintiff complained of it more than once, and was told the guard should be restored. This was not done, and whilst plaintiff in the course of his duty was oiling the machinery, he sustained the injury for which the action was brought. Against plaintiff's right to recover two points were made. It was said plaintiff's own negligence caused the injury but that was regarded as a question of fact for the jury. The point of law was, that plaintiff having undertaken a dangerous service, with knowledge of the danger, could not recover damages in consequence of an injury which ensued from the risk he had voluntarily undertaken. In ruling against this contention, the court said: "Many cases might be put in which a servant might reasonably incur the risk instead of abandoning the service, and if, during a period when the danger of the service is increased by the machinery becoming unprotected, either by accident or decay, or from other causes, the servant complains, and the master promises that the protection shall be restored, it must be considered that the master takes upon himself the responsibility of any accident that may occur during that period."

Use of Defective Machinery Required by Emergencies of Master's Business—Defective Engine.—In *Greene v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 248, 17 N. W. 378, it appeared that the plaintiff, a locomotive engineer, had called the attention of his railroad company to a defect in the engine which he was operating, and which the company then promised to repair at the end of the next trip. While making that trip plaintiff was injured while operating the defective engine, and by reason of the defect. The court said in discussing the effect of the promise given to him: "But it is now almost as equally well settled, that if a servant who has knowledge of defects in the instrumentalities furnished for his use, gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. * * * Courts also differ as to the ground upon which this rule should be placed. Some place it upon the ground of policy and justice, upon a consideration of the unequal situation of master and servant, others upon the ground that in such cases, the facts rebut the presumption of a waiver on the part of the servant, others upon the ground of a contract on the part of the employer, implied from the facts, that if the servant continued in the service in the meantime and until the defects are remedied, the em-

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ployer and not the servant will assume the risks. We will not attempt to determine which of these is the best or the most logical reason for the rule except to say that the last seems to us very forcible, especially where there is a request to the servant to continue the service. It is sufficient for us that the rule has generally commended itself to the judicial mind, as it does to us, as founded in sound policy and common justice. If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at risk of the servant, and not at his own, when, notwithstanding the servant's objection to the condition of machinery, he has requested or induced him to continue its use under a promise thereafter to repair it."

2. Waiver of Assumption of Risk by Employee.

In *Missouri, etc., Ry. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631, it is held that if a railroad company furnishes its employee with tools so defective as to be dangerous, and such defects are obvious, the employee assumes the risk of using them; but if his employer knows such fact and instructs the servant to use them, promising to send them in for repairs, and the employee continues to use them under such promise, it is a waiver on the part of the company of the assumption of the risk by the employee.

3. Reliance on Master's Judgment.

Inexperienced Miner Injured by Fall of Rock from Insufficiently Supported Roof of Coal Mine.—In *Kansas & Texas Coal Co. v. Chandler*, 71 Ark. 518, 77 S. W. 912, it appeared that an inexperienced miner was injured by the fall of a rock from the insufficiently supported roof of a coal mine. It was held that it could not be said, as matter of law, that he assumed the risk of working under the roof, where he had requested the foreman to furnish him sufficient timbers to prop the roof, and was told by the latter to go ahead, that he would send the props needed; but that the question was for the jury under all the circumstances of the case. In this case it is said in the opinion: "While plaintiff had been at work mining coal for the company about six weeks previous to his injury, and knew that it was necessary to have the roof supported, and was aware that there was danger in an unsupported roof, yet it is probable that he did not consider his judgment concerning the condition of the roof as good as that of the foreman of the mine, who advised him, so plaintiff says, to go ahead and continue the work."

4. Does Not Show Servant's Willingness to Assume Risk.

In *Dunkerley v. Webendorf Machine Co.*, 71 N. J. L. 60, 58 Atl. 94, it is held that the willingness of a servant to assume the risk of obvious dangers is not shown by the fact that he knew of the danger,

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in a case where the servant has made complaint, received a promise to repair and continued work in reliance on the promise.

5. Promise Relieves Servant of Charge of Negligence in Continuing in Service.

In *Missouri Furnace Co. v. Abend*, 107 Ill. 44, it is said in the opinion: "It is now uniformly stated by text writers, that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and if any injury results therefrom he may recover, unless the danger is so imminent that no prudent person would undertake to perform the service. The doctrine on this subject rests on sound principle, and it will be found to be supported by English and American decisions. The reason upon which the rule is said to rest is, that the promise of the master to repair defects relieves the servant from the charge of negligence in continuing in the service after the discovery of the extra perils to which he would be exposed."

6. Promise Does Not Make Master Insurer.

But in *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556, 78 S. W. 172, it was held that where defendant promised to repair a defective roof over a pumping station where plaintiff was the sole employee, the promise did not make defendant an insurer of plaintiff's safety during the time reasonably necessary to make the repairs.

E. APPLICATION OF RULE AS AFFECTED BY PECULIAR CIRCUMSTANCES.

1. Defect in Original Construction.

The rule permitting a servant to work for a reasonable time after the master's promise to remedy defects complained of, applies where the defect is in original construction as well as where it is due to a falling out of repair. So held in *Swift & Co. v. O'Niell*, 187 Ill. 337, 58 N. E. 416.

2. Car Repairer Killed While under Car—Insufficiency of Regulations.

In *St. Louis, etc., Ry. Co. v. Triplett*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, it appeared that plaintiff's decedent, when killed, was a car repairer engaged in work under a car so situated that a jar from an approaching car would cause it to fall and crush him. It was held that if deceased had complained to the proper official of the railroad that its regulations were insufficient to protect him while in such a situation and the company had indicated that it would correct the evil, he was justified in remaining in the service of the railroad.

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3. Promise to Instruct Servant.

The rule that a servant engaging in a service attended with danger assumes the risk of the ordinary perils which are incidental to it does not apply when the servant enters into the employment under the promise of his master that he shall thereafter be instructed in his duties, as in such case the servant relies for protection upon the instruction to be thereafter given him. So held in *McCormick Harvesting Machine Co. v. Burandt*, 136 Ill. 170, 26 N. E. 588.

4. Defect Caused by Injured Servant's Negligence.

The general rule is applicable as well where the defective condition is the result of the servant's carelessness or negligence as where it results from other causes. *Atchison, etc., Ry. Co. v. Sledge* (Kan.), 74 Pac. 1111, 10 R. R. R. 229, 33 Am. & Eng. R. Cas., N. S., 229.

5. Incompetent Fellow Servants, Promise to Remove.

In *Lyberg v. Northern Pac. R. Co.*, 39 Minn. 15, 38 N. W. 632, it is held that a servant who has been promised by the master that an incompetent and unsafe fellow servant shall be removed, may remain for a time in the service, without being conclusively chargeable, as a matter of law, with contributory negligence.

In *Gray v. Red Lake Lumber Co.*, 85 Minn. 24, 88 N. W. 24, it is held that if a servant complains to and notifies his master that a fellow servant with whom he is associated in the performance of the work of their employment is incompetent and unfit for the work in which they are jointly engaged and the master promises to replace the incompetent with a competent workman, in consequence of which he is induced to remain in the master's service, the complaining servant may remain in such service for a reasonable time, to enable the master to fulfill his agreement, during which time he does not assume the risks incident to or arising out of such incompetency, unless they are so obvious and imminent that person of ordinary care and prudence would not incur them.

6. Common Appliances of Simple Construction.

But the master's promise to repair a defect or otherwise remove a dangerous condition does not suspend the servant's assumption of risk where the latter is engaged in ordinary labor or using tools or appliances of simple construction, so that he is fully chargeable with notice of the exact nature of the danger to which his continuance in the employment will expose him.

United States.—*Gowen v. Harley* (C. C. A.), 56 Fed. Rep. 973; *Musser-Sauntry, etc., Co. v. Brown* (C. C. A.), 126 Fed. Rep. 140.

Illinois.—*Bowen v. Chicago & N. W. R. Co.*, 117 Ill. App. 9; *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393; *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417; *International Packing Co. v. Kreto-wicz*, 119 Ill. App. 488; *McCormick Harvesting Machine Co. v. Woj-*

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ciechowski, 111 Ill. App. 641; Webster Mfg. Co. *v.* Nisbett, 205 Ill. 273, 67 N. E. 936.

Indiana.—Indianapolis Union Ry. Co. *v.* Ott (Ind.), 35 N. E. 517; Meador *v.* Lake Shore, etc., Ry. Co., 138 Ind. 290, 37 N. E. 721.

Massachusetts.—Counsell *v.* Hall, 145 Mass. 468, 14 N. E. 530; Dailey *v.* Fiberloid Co., 186 Mass. 318, 71 N. E. 554; Levesque *v.* Janson, 165 Mass. 16, 42 N. E. 335; Nealand *v.* Lynn & Boston R. Co., 173 Mass. 42, 53 N. E. 137.

Michigan.—Cantwell *v.* Brennan & Co., 125 Mich. 349, 84 N. W. 299.

New York.—Marsh *v.* Chickering, 101 N. Y. 396, 5 N. E. 56; McCarthy *v.* Washburn (Sup. Ct.), 42 N. Y. App. Div. 253; Spencer *v.* Washington (Sup. Ct.), 44 N. Y. App. Div. 496; Baumwald *v.* Trenkman (Sup. Ct.), 88 N. Y. Supp. 182.

Tennessee.—Brewer *v.* Tennessee Coal, etc., Co., 97 Tenn. 615, 37 S. W. 549.

Wisconsin.—Corcoran *v.* Milwaukee Gas Light Co., 81 Wis. 191, 51 N. W. 328; Showalter *v.* Fairbanks, Morse & Co., 88 Wis. 376, 60 N. W. 259.

The rule under which a servant does not assume the risk of a defect which the master has promised to repair does not apply to the use of common implements with which the servant is familiar. So held in Webster Mfg. Co. *v.* Nisbett, 205 Ill. 273, 67 N. E. 936.

Particular Skill or Experience Necessary.—The cases where a promise by the master to repair suspends the servant's assumption of risk, are those where particular skill or experience is necessary to know and appreciate the danger from the defect, or where machinery or materials are used of which the servant can have but little knowledge. So held in Gunning System *v.* Lapointe, 212 Ill. 274, 72 N. E. 393.

In Musser-Sauntry, etc., Co. *v.* Brown (C. C. A.), 126 Fed. Rep. 140, it is held that where a defect in a tool or appliance furnished for the use of an employee is obvious and well known, and the danger from its use is apparent and appreciated by him, by continuing in the service and the use of the appliance he assumes the risk from the defect, notwithstanding a promise by the employer to obviate the dangers.

Rule Applicable Where Defect in Simple Instrument.—But it is held in Louisville Hotel Co. *v.* Kaltenbrun (Ky.), 80 S. W. 1163, that after an employee has complained of a dangerous defect or condition, and the master promises to repair the defect or remedy such condition, the employee may continue in the employment, unless the danger is so imminent and manifest that no prudent person would be justified in taking the risk of the continued service, and this rule is as applicable where the danger is caused by a defect in a simple instrument as where the defect is in a complex one.

Switchman Injured by Reason of Loose Stones in Yard Near Track.—In Kansas City S. Ry. Co. *v.* Billingslea (C. C. A.), 116 Fed. Rep. 335, it is held that a switchman who, with knowledge that the yards in which he was working had become defective and dangerous by

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reason of loose stones which had been left therein, near the tracks, on being told by the yard foreman that he was going to clear away the obstructions, consented to remain in the employment, and assisted in switching cars to the places needed, while so engaged assumed the risks from the presence of the stones.

Yard Brakeman Furnished with Defective Lantern.—In *Indianapolis Union R. Co. v. Ott* (Ind.), 35 N. E. 517, it appeared that a yard brakeman, having been furnished with a defective lantern, complained of it several times, and was promised that he should have a new one. The jury found that the danger of coupling cars with such a lantern was apparent and continuous, and that the lantern had gone out each day that the brakeman had used it. It was held that he had assumed the risk, and could not recover for injuries received by reason of its going out while he was making a coupling.

Unloading Logs from Sleds—Knocking out Log-Chain Hook with Axe—Promise to Furnish Axe with Longer Handle.—In *Musser-Sauntry, etc., Co. v. Brown* (C. C. A.), 126 Fed. Rep. 140, it appeared that plaintiff was employed in unloading logs from sleds on which they were piled several feet high, and bound with a chain, which he loosened by knocking out the hook with an axe. He requested an axe with a longer handle, and was promised one by the foreman, but meantime continued at work with the one provided until he was injured by the logs rolling down upon him. He knew that some of them usually fell as soon as the chain was released, but relied on his ability to get out of the way by running. It was held that such promise did not relieve him from the assumption of the risk.

"Back-Hammer"—Blacksmithing.—A foreman's or master's promise to repair a "back-hammer," used in blacksmithing, does not exempt an experienced servant from assuming the ordinary risks of its use in its defective condition. So held in *Webster Mfg. Co. v. Nisbett*, 205 Ill. 273, 67 N. E. 936.

Canting over of Inclined Plank Runway—Injury to Employee Wheeling Barrow.—In *Dailey v. Fiberloid Co.*, 186 Mass. 318, 71 N. E. 554, an action by an employee for injuries caused by the canting over of a plank runway up which plaintiff was wheeling ashes in a barrow, it appeared that he had been in the employment for years; that for about a month before the accident the runway had been warped and twisted and he had been accustomed to trig up with a wooden wedge one of the corners of the runway resting on the floor; that when the wedge was in the plank was firm but that it was rickety without it; that three or four days before the accident plaintiff told defendant's superintendent the plank was warped or rickety and was not fit to wheel on, and the superintendent said he would see to it. Plaintiff testified that he supposed the wedge was in when he started up the plank because he "generally looked every barrel." It was held that plaintiff could not recover, as he knew the condition of the runway and assumed the risk, and there was nothing to show he was induced to continue to work by any statement of the superintendent.

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Fall from Elevated Walkway—Obvious Defects.—A servant injured by falling from a defective elevated walkway used in the course of his employment cannot recover against his employer for his injuries, where the defects of the walkway, caused by the wear of long use, were plain and obvious, requiring no special skill to detect and appreciate them, and were equally within the observation and knowledge of both parties, although the servant had notified the master of the existence of the defects and obtained from him an indefinite promise to repair them, which, however did not afford the inducement for his remaining in the service. So held in *Brewer v. Tennessee Coal, etc., Co.*, 97 Tenn. 615, 37 S. W. 549.

Sign Painter Injured—Promise to Put Additional Brace upon Bulletin Board.—An experienced sign painter who works for three days upon a bulletin board after exacting a promise from his foreman to put an additional brace upon the board, which could have been done within a few hours, assumes the risk of injury from the absence of the brace, where he had full knowledge of the defect and the danger therefrom. So held in *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393.

Box Used to Stand on.—In *International Packing Co. v. Kretowicz*, 119 Ill. App. 488, it is held that to hold the employer liable on account of promise of its foreman to replace an implement so simple in its use as a box used to stand on would extend the rule of respondeat superior beyond reasonable limits.

Fall of House Painter from Defective Ladder.—In *St. Louis, etc. Ry. Co. v. Kelton*, 55 Ark. 483, 18 S. W. 933, an action by a house-painter to recover for an injury caused by a fall from a defective ladder furnished by his employer, it was held that he was not entitled to recover if, knowing the ladder could not be used with any assurance of safety, he continued to use it until the injury occurred, relying upon his employer's promise to furnish a safe ladder.

Defective and Dangerous Ladder.—In *Meador v. Lake Shore, etc. Ry. Co.*, 138 Ind. 290, 37 N. E. 721, it appeared that an employee, whose duties required him to use a ladder, discovered that it was defective and dangerous, and notified his employer, who promised to furnish another, but before doing so the employee, in using the defective ladder, was injured. It was held that the master was not liable, although the service in which the ladder was used could not be postponed.

Uneven Floor—Fall of Ladder and Workman.—In *Nealand v. Lynn & Boston R. Co.*, 173 Mass. 42, 53 N. E. 137, it is held that where a workman, who, while standing on a ladder, the top of which rests against the front of a boiler and the bottom upon the brick floor of the room, engaged in clearing the face of the boiler, is injured by falling from the ladder to the floor, cannot maintain an action for his injuries on the ground that the floor was uneven and ridgy, causing the ladder to slip, if the floor is then in the same condition as it was when

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he entered defendant's service; but he assumes the risk of working upon it as it was and if while working there, defendant's engineer in charge of the boilers led him to believe that a new floor would be put in, that would not effect defendant's liability.

7. Scope of Employment, Injured Servant Must Be Acting within.

Insufficient Lights in Oil Mill.—A promise by an employer, on complaint from his employee of insufficient lights in the oil mill where he worked, to remedy the defect, relieves the servant from assumption of risk only while engaged within the scope of his employment with reference to which the promise was made; and if he undertakes other duties, under special order of the foreman, and with knowledge of the insufficiency of the light for the safe performance of such duties, he assumes the risk. So held in *Hillje v. Hettich*, 95 Tex. 321, 65 S. W. 491.

8. Where Fulfillment of Promise Would Not Have Prevented Accident.

If the condition which the employer promised to remedy was not the cause of the servant's injuries, so that the fulfillment of the promise would not have prevented the accident, there can be no recovery against the master based on the rule suspending the servant's assumption of risk. *Crum v. North Vernon Pump, etc., Co.*, 4 Ind. App. 253; *Johnson v. Anderson & Middleton Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Olson v. Doherty Lumber Co.*, 102 Wis. 264, 78 N. W. 572.

Simple Act of Manual Labor—Possibility of Performing with Safety without Promised Tools.—An employee who is required to perform a simple act of manual labor, the risks of which are obvious, cannot escape from his assumption of such risks by proving that his employer promised to furnish him tools by the use of which his work could be done in a different way, or more conveniently, or more safely, if it could be performed with reasonable safety without such tools. So held in *Gowen v. Harley (C. C. A.)*, 56 Fed. Rep. 973.

Fall of Slab from Cut-Off Saw upon Fireman Feeding Furnace on First Floor—Failure to Allege that Chute Would Avoid or Lessen Danger.—In *Crum v. North Vernon Pump & Lumber Co.*, 34 Ind. App. 253, the complaint, by an employee against his employer, alleged that plaintiff was employed as fireman; that in firing he used slabs; that the cut-off saw from which such slabs were received was in the second story and that the operator pitched the slabs from such story so as to fall in front of the furnace on the first floor; that plaintiff could not see such operator nor could the operator see plaintiff; that defendant promised to remove the danger by putting in a chute and that by reason of such promise plaintiff was induced to remain, and was injured. It was held that such complaint was bad because there was no allegation showing that such chute would have avoided or lessened the dangers.

Absence of Proof That Defect Increased Danger.—In the absence of proof of a defect which added to the danger of the operation of a ma-

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chine, a promise by the employer to fix it imposes no liability upon him. So held in *Higgins v. Fanning & Co.*, 195 Pa. St. 599, 46 Atl. 102.

II. COMPLAINT BY SERVANT.**A. NECESSITY OF COMPLAINT.**

Of course, the servant must complain of the danger to which he is exposed, either in express terms, or by necessary implication. But this is too obvious to require a citation of authorities. The object of this section of our note is to explain and illustrate other points relating to the servant's complaint, its sufficiency, etc.

B. COMPLAINT TO VICE PRINCIPAL SUFFICIENT.

The employee may make his complaint to his master's representative as to the matter in question. *Boyd v. Blumenthal & Co.*, 3 Penn. (Del. Sup'r Ct.), 564; *Odin Coal Co. v. Tadlock*, 216 Ill. 624, 75 N. E. 332; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del. Sup'r Ct.), 525.

Yardmaster's Promise to Conductor of Better Men for Next Trip of Freight Train.—In *Louisville & N. R. Co. v. Wyatt's Adm'r* (Ky.), 93 S. W. 601, 20 R. R. R. 413, 43 Am. & Eng. R. Cas., N. S., 413, it is held that where the rules of a railroad made it the duty of a yardmaster to call out the men to compose the different crews on freight trains, and provided that a yardmaster must not permit a train to start with brakemen unfitted for duty, though it was the duty of the "master of trains" to employ and discharge employees, a complaint by a conductor to the yardmaster of the unfitness of certain brakemen was notice to the railroad; and the yardmaster's promise of better men for the next trip, which promise was relied on by the conductor, placed on the railroad all risk of injuries to the conductor caused by the unfitness of the brakemen.

C. SUFFICIENCY OF COMPLAINT.**1. In General.**

Need Not Be Direct Threat to Quit Work.—In order that an employee may, without assuming the risk, continue to work with a defective and dangerous appliance in reliance upon a promise by the master to repair, there need not be a direct threat on his part to quit work unless the repairs are made, but the master must be given to understand that the servant protests and objects to continued exposure to the danger. So held in *Yerkes v. Northern Ry. Co.*, 112 Wis. 184, 88 N. W. 33.

Need Not State Apprehension of Danger nor Intention to Quit Service.—A servant's complaint of a defect in a machine he is operating need not state an apprehension of danger, nor that the servant will leave the service if the defect is not remedied, and it is sufficient if it can be fairly inferred that the servant is complaining on his own account, and that he was induced to remain in the employ-

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ment by reason of his master's promise to remedy the defect. So held in *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

In *Rothenberger v. Northwestern Consolidated Milling Co.*, 57 Minn. 461, 59 N. W. 531, it is held that when complaining of defective instrumentalities or machinery to the master, it is not necessary that the servant shall state in exact words that he apprehends danger to himself by the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if, from the circumstances and the conversation, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise.

2. Illustrations.

Failure to Inform Master That Defect Render's Work Extra Hazardous.—In *Equitable Powder Mfg. Co. v. Green*, 109 Ill. App. 403, it is held that where an order to continue work, with a promise to sharpen a punch, is made by the master without notice or knowledge that the work had become extra hazardous on account of the punch being dull, and its being dull does not suggest to a reasonably competent master that on this account the work has become extra hazardous, an order to go back to work is not a waiver of an assumption by the employee of any risk on account of the punch being dull.

Injured While Applying Compound to Pulley—New Block of Compound Asked for, "So as Not to Run Out of It."—In *Cantwell v. Breman & Co.*, 125 Mich. 349, 84 N. W. 299, it appeared that plaintiff, an employee of defendant, was injured while applying a compound to a revolving pulley in order to prevent the slipping of a loose belt which passed around the pulley; that he had, before the accident, worn the compound thin with use, and had asked the superintendent for a new block of compound, "so as not to run out of it," and had been directed to use what he already had; and that he had advised the tightening of the belt, and was told that it would be tightened. It was held that there was nothing in such facts to relieve plaintiff from the assumption of the risk, as such suggestions were not made by him because he was in fear of injury.

Defective Drawhead on Car—Complaining Merely of Its Insufficiency for Its Work.—In *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596, 55 S. W. 362, it appeared that an employee having knowledge of a defective drawhead on a car he was required to operate, called it to the attention of the master, who promised to repair it. But the complaint was not made on the ground of danger in using it, but for its insufficiency for its work. The employee continued to use it with knowledge that it had not been repaired, and was injured by reason of its defects. It was held that the risk was assumed by the servant.

Injured by Falling of Car from Bridge While Engaged in Removing Other Fallen Cars.—Plaintiff, a foreman in a lumber mill, was hurt by

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a tram car falling from a bridge into a ravine over which the track ran. He was engaged at the time in removing from such ravine other cars which had on prior occasions fallen from the same track at the same place. It was held that the evidence showed a sufficient expression of appreciation of personal danger to the servant to bring the case within the ordinary rule which justifies a servant in continuing in a dangerous employment because of reliance upon the promise of the master to remedy defects in instrumentalities or work place in answer to a complaint made by the servant. *Viou v. Brooks-Scanlon Lumber Co.* (Minn.), 108 N. W. 891.

In this case the testimony showed that some ten days prior to the accident, the plaintiff had a conversation with his boss in which he called attention to the fact that the curve in the track at such point was too short, and that he was having trouble there all the time. At one place he testified that, in such conversation, he also said that "somebody is going to get hurt here."

Sufficiency of Servant's Protest Was Question for Jury.—In *Yerkes v. Northern Pac. Ry. Co.*, 112 Wis. 184, 88 N. W. 33, it appeared that plaintiff, an experienced railroad yard foreman, entered into a book which was the ordinary medium of communication between himself and his immediate superior, the yard master, a notification of a defect in the foot-board of the back of the switch engine. The same afternoon both the yard master and the plaintiff called the defect to the attention of the roundhouse foreman, an employee having charge of repairs, over whom neither had any control. The roundhouse foreman remarked that the step was not very bad, and plaintiff replied, "it is bad enough, and I want it fixed. I consider it unsafe." When the engine was again brought out for use that evening plaintiff called the attention of the yard master to the failure to repair the step, and the latter replied, "use it tonight, and I will see that it is fixed tomorrow." It was held that this was sufficient to take to the jury the question whether plaintiff protested and objected to further use of the locomotive.

Road Engine Furnished for Switching—Absence of Run-Boards—Any Expressions Indicating Unwillingness to Work without Run-Boards.—In *Pieart v. Chicago, etc., Ry. Co.*, 82 Iowa 148, 47 N. W. 1017, it appeared that deceased was employed as a switchman in defendant's yards; that until within a week of the time he was injured defendant had furnished for the switching done in its yards a road-engine with run-boards bolted to the base of the pilot, upon which the switchman might step and stand when the engine was moving, and from which to make couplings when necessary. This engine was sent away for repairs and another road-engine without run-boards was furnished. Deceased objected to the yardmaster to the use of this engine without run-boards. The latter had not authority to supply run-boards but it was his duty to inform the trainmaster of such objection. This was not done, and upon the assurance of the yardmaster that the engine would only be there a few days, and

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that if the old engine was not repaired soon he would have a new one. It was held that any acts or expressions by which deceased gave the proper agent of defendant to understand that he was unwilling to continue to do the work without run-boards on the engine was a sufficient complaint; that the complaint was properly made to the yardmaster, and that it was a question for the jury whether deceased was induced to continue in the employment by the assurances of defendant that a proper engine would be furnished.

Burden of Proving Protest against Use of Defective Appliances.—In *Ford v. Chicago, etc., Ry. Co.* (Iowa), 71 N. W. 332, an action for death caused by defective appliances, it is held that the burden of proving that deceased protested against their use in such condition, and continued in the employment on defendant's promise to repair, is on plaintiff.

III. PROMISE OF MASTER.

A. NECESSITY OF PROMISE.

1. In General.

Of course the mere fact that a servant has complained of a danger to which he is exposed is not sufficient to suspend his assumption of risk. His employer must promise to remedy the dangerous condition.

Indiana.—*Indianapolis, etc., Ry. Co. v. Watson*, 14 Ind. 20, 14 N. E. 721, 15 N. E. 824.

Minnesota.—*Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326, 38 N. W. 908.

New Mexico.—*Alexander v. Tennessee, etc., Mining Co.*, 3 N. Mex. 173, 3 Pac. 735.

New York.—*Kueckel v. O'Connor* (Sup. Ct.), 36 N. Y. Misc. Rep. 335.

Tennessee.—*East Tenn., etc., R. Co. v. Duffield*, 12 Lea (Tenn.), 63.

Texas.—*Galveston, H. & S. A. Ry. Co. v. Drew*, 59 Tex. 10.

A servant, who continues in the service of his master after a notice of a defect increasing the danger, assumes the risk from the defect, notwithstanding he may object or complain, unless the master expressly or impliedly promised to remedy the defect. So held in *Indianapolis, etc., Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824.

In *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 45 Pac. 405, it is said in the opinion: "By voluntarily continuing in the service with knowledge, or means of knowledge equal to his employer's of any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employee assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby." See also *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Iowa Gold Min. Co. v. Diefenthaler*, 32 Colo. 391, 76 Pac. 981; *Harvey v. Mountain Pride Gold Min. Co.*, 18 Colo. App. 234, 70 Pac. 1001; *Dickson v. Newhouse* (Colo.),

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82 Pac. 537; *Colorado C. R. Co. v. Ogden*, 3 Colo. 499; *Burlington, etc., R. Co. v. Liehe*, 17 Colo. 280, 29 Pac. 175.

2. Illustrations.

Foreman of Mine Injured by Reason of Defective Hoisting Machinery.—In *Alexander v. Tennessee, etc., Mining Co.*, 3 N. Mex. 173, 3 Pac. 735, an action for personal injuries, it appeared that plaintiff, the foreman of a mine, before he entered the service of defendant mining company, knew of a defect in its hoisting machinery, by means of which he was subsequently injured, and brought it to the attention of defendant's superintendent, but undertook the employment without any promise being made to remedy the defect. It was held that a verdict was properly directed for defendant.

B. WHOSE PROMISE.

1. In General.

The promise must be made by the master or one clothed with his authority to the necessary extent. *Babb v. Oxford Paper Co.*, 99 Me. 298, 39 Atl. 290; *Ehmcke v. Porter*, 45 Minn. 338, 47 N. W. 1066; *Jones v. New American File Co.*, 21 R. I. 125, 42 Atl. 509; *Gulf, etc., Ry. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561; *Hewprtock v. Lackawanna Iron & S. Co.*, 98 N. J. App. Div. 332.

2. Illustrations.

Authority of Person Promising to Make Work Place Safe.—In *Ehmcke v. Porter*, 45 Minn. 338, 47 N. W. 1066, it is held that a servant whose duties require him to work in a place known by him to be unsafe, so he would otherwise be taken to have assumed the risk, cannot relieve himself from such assumption of risk by showing a promise to make the place safe by one other than the master, unless such person had authority to determine what should be done for the safety of those employed in the place, and to do it or have it done.

Right of Injured Employee to Rely on Assumed Authority to Make Promise.—But where the employer is negligent in furnishing defective machinery, and one who continues in the service under a promise by another servant to repair is injured, it is immaterial whether the servant making the promise had authority to do so, provided the injured employee had reasonable grounds to suppose him to have such authority. So held in *Dells Lumber Co. v. Erickson* (C. C. A.), 80 Fed. Rep. 257.

Operation of Machine with Defective Screw—Approval of Master—Estoppel.—In *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521, it is held that if the mode of operating the machine in question with a defective screw was approved of by the master, who assured plaintiff it was all right so to work it, and told him to go ahead, with the promise to remedy the defect later, the master was estopped to urge that the servant's method of operation was unauthorized or improper.

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C. VICE PRINCIPAL'S PROMISE SUFFICIENT.

1. In General.

Of course, it follows from the preceding rule that the promise need not be made by the employer himself. A promise by a vice principal or other representative of the master may be sufficient to suspend the complaining servant's assumption of risk.

United States.—*Barney Dumping Boat Co. v. Clark* (C. C. A.), 112 Fed. Rep. 921; *Homestake Min. Co. v. Fullerton* (C. C. A.), 69 Fed. Rep. 923; *Parody v. Chicago, etc., Ry. Co.* (C. C. A.), 15 Fed. Rep. 205.

California.—*Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521:

Georgia.—*Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33.

Iowa.—*Pierat v. Chicago, etc., Ry. Co.*, 82 Iowa 148, 47 N. W. 1017.

Texas.—*Gulf, etc., Ry. Co. v. Garren* (Tex. Civ. App.), 72 S. W. 1028; *Hillje v. Hettrich* (Tex. Civ. App.), 65 S. W. 491.

2. Illustrations.

Promise of Foreman in Wagon Factory to Substitute Safe Floor.—In *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714, it appeared that it was the duty of the foreman in a wagon factory to see that the material for all the wagons went into the factory, and went out in proper shape made into wagons. It was held that he had authority to bind his employer by promising a hand to have a dangerous floor replaced with a safe and proper one.

Laborers Ordered into Hold of Ship—Promise of Foreman to Station "Hatchtender"—Struck by Bale of Cotton.—In *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33, it was held that if H., the person to whom the superintendence of the work had been intrusted, was general foreman over the loading of the whole ship, the laborers were entitled to rely upon his promise, made when he ordered them to go into the hold and begin work, that a "hatchtender" would be stationed at the hatchway; and if one of them, relying upon this promise, obeyed the order, and no such person was placed at the hatchway, the steamship company would be responsible for a personal injury occasioned by his being struck by a bale of cotton thrown into the hold without warning.

Promise of Corporation's Superintendent in Charge of Work—Assumption of Authority to Fulfill.—Where the employer is a corporation an employee may be justified in relying on a promise to remedy dangerous conditions made by its superintendent in charge of the work, who assumes to have authority to make the changes promised, although he may not in fact have it. So held in *Barney Dumping Boat Co. v. Clark* (C. C. A.), 112 Fed. Rep. 921.

D. PROMISE NOT MADE DIRECTLY TO INJURED EMPLOYEE.

1. In General.

In order that a promise by the master to make repairs or remove a

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danger may be relied on by an employee it is not necessary that the promise be made directly to him, provided it is made in his presence or in the presence of others who informed him of it. And it may be made in his behalf alone or for the benefit of him and other employees exposed to the same danger.

Atchison, etc., R. Co. v. Sadler, 38 Kan. 128, 16 Pac. 46; *Odin Coal Co. v. Tadlock*, 216 Ill. 624, 75 N. E. 332.

2. Illustration.

Promise Inured to Benefit of All Hands at Work on Railroad Section in Whose Hearing and Presence It Was Made.—In *Atchison, etc., R. Co. v. Sadler*, 38 Kan. 128, 16 Pac. 46, it appeared that a section foreman told employees on his section that the railroad company had promised to send him new tools in place of those in use, known to be defective. It was held that this promise inured to the benefit of all employees at work on the section in whose hearing and presence it was made; and that if, after a reasonable time had elapsed, and the new tools were not furnished, an employee on the section was injured by the use of a defective tool, the company could not defeat recovery for his injury merely because the promise was not made to him individually.

E. PROMISE NEED NOT BE EXPRESS.

And it is not essential that the promise be made in express terms. Any expressions or conduct of master which will entitle the servant to believe that the master thereby intends to promise to remove the danger will be sufficient.

United States.—*Detroit Crude-Oil Co. v. Grable* (C. C. A.), 94 Fed. Rep. 75.

California.—*Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

Indiana.—*East Chicago Iron & Steel Co. v. Williams*, 17 Ind. App. 573.

Iowa.—*Pieart v. Chicago, etc., Ry. Co.*, 82 Iowa 148, 47 N. E. 1017; *Stoutenburg v. Dow, etc., Co.*, 82 Iowa 179, 47 N. W. 1039.

Minnesota.—*Rotenberger v. Northwestern Consolidated Milling Co.*, 57 Minn. 461, 59 N. W. 531.

Texas.—*Southern Pac. Co. v. Lasch*, 2 Tex. Civ. App. 68, 21 S. W. 563.

Washington.—*Crooker v. Pacific, L. & M. Co.*, 34 Wash. 199, 75 Pac. 632.

F. PROMISE NEED NOT NAME EXACT TIME FOR ITS FULFILLMENT.

1. In General.

To justify an employee in remaining in his employment in reliance on his master's promise to repair defects, or remedy other dangerous conditions, it is not necessary that a definite time for fulfilling the promise should be fixed, as a reasonable time will be implied, in the absence of an agreement on the subject.

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Burch v. Southern Pac. Co. (C. C. A.), 140 Fed. Rep. 270; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Andrecsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 718; *Missouri, etc., R. Co. v. Baker*, 35 Tex. Civ. App. 542, 81 S. W. 67.

In *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979, it is said in the opinion: "It was not necessary that the foreman should fix a definite time when the repairs should be made to enable plaintiff to recover for an injury received while engaged in the service of defendant after the notice was given. When the notice was given the foreman promised to see that the repairs should be made. This was, in effect a promise to repair in a reasonable time, and the plaintiff could remain in the service of the defendant a reasonable time to permit the fulfillment of the promise, without being guilty of negligence."

2. Illustrations.

Absence of Shields about Oil Tube of Locomotive.—In *Cincinnati, etc., Ry. Co. v. Robertson* (C. C. A.), 17 R. R. R. 324, 40 Am. & Eng. R. Cas., N. S., 324, 139 Fed. Rep. 519, it is held that where plaintiff, a railroad engineer, complained to his foreman of the absence of a shield about an oil tube on his engine, and the foreman promised to furnish shields, without specifying any time, plaintiff was entitled to use the engine without shields without assuming the risk of injury from their absence for a reasonable time to enable defendant to procure and fit them.

3. Time Expressly Fixed.

But where the time of performance of the master's promise to repair is clearly fixed by the agreement of the parties, there is no question, for the jury, of a reasonable time for performance. So held in *Andrecsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 718.

G. SUFFICIENCY OF PROMISE IS QUESTION FOR JURY.

The sufficiency of the master's promise to entitle the servant to rely upon it is generally a question for the jury.

California.—*Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

Kentucky.—*Chesapeake, etc., Co. v. McDowell*, 16 Ky. L. Rep. 1, 24 S. W. 607.

Massachusetts.—*Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454; *McKinnon v. Riter-Conley Mfg. Co.*, 186 Mass. 155, 71 N. E. 296.

Missouri.—*Studenroth v. Hammond Packing Co.*, 106 Mo. App. 481; *Whaley v. Coleman*, 113 Mo. App. 594.

Pennsylvania.—*Madara v. Pottsville Iron & Steel Co.*, 160 Pa. St. 109, 28 Atl. 639.

Washington.—*Crooker v. Pacific L. & M. Co.*, 29 Wash. 30, 69 Pac. 359.

H. ILLUSTRATIONS OF SUFFICIENT AND INSUFFICIENT PROMISES.

1. Sufficient Promises.

Right of Prudent Man to Rely upon Promise.—If the promise to

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repair is such that a prudent man might reasonably rely upon it with confidence that it would be fulfilled, he may continue in the work, and, if he is injured thereby, he may recover damages from his employer. *Harvey v. Alturas Gold Min. Co. (Idaho)*, 31 Pac. 819.

Road Engine Substituted for Switching Engine—Absence of Foot-Boards—Promise to Use Engine Only One Week.—In *Pieart v. Chicago, etc., R. Co.*, 82 Iowa 148, 47 N. W. 1017, it appeared that a switching engine used in the defendant's yard being laid up for repairs, a road engine having the usual pilot bars was put temporarily to do its work. The plaintiff's intestate, a brakeman, complained to the yardmaster of the danger of using this engine without foot-boards, and asked that he might put them on, but was dissuaded by the yardmaster saying that the engine would not be used over one week. The brakeman was shortly after killed by the use of this engine. It was held that such complaint and promise rendered the company liable.

Told to Work with Defective Tool until Others Arrived.—A section man who complains of the bad condition of the tool with which he has to work, and is promised a new and good one, and is told to work with the defective tool until the others arrived, and relying on such promise, and there being no immediate danger, does so, and is injured by the use of the defective tool, is entitled to recover for the resulting damages. So held in *Southern Kan. Ry. Co. v. Croker*, 41 Kan. 747, 21 Pac. 785.

Promise to Repair Machine as Soon as Sufficient Boards Were Stamped by It to Keep Box-Makers Busy Pending Repairs.—A promise by the master to repair a machine his employee was operating as soon as sufficient boards were stamped by it to keep his box-makers busy while the repairs were being made must be presumed to have been made with special reference to a time understood by both parties, and to be sufficiently definite; and where the injury happened on the same day the promise was given and while the employee, under order of the master, was operating the machine under an endeavor to keep up with the box-makers, pending the fulfillment of the promise, the servant did not assume the risk, on the ground that the promise was not sufficiently definite. So held in *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

Unsafe Work Place—Promise to Repair as Soon as Possible.—In *Westville Coal Co. v. Wool*, 96 Ill. App. 616, it appeared that an employee called the attention of his employer to the fact that the place where he worked was not in a proper condition, telling him he would quit his employment unless it was repaired, and was told to get along the best he could and the place would be repaired as soon as possible and he continued in the service and was injured shortly afterwards by reason of such condition. It was held that he did not assume the extra hazard while he had the right to rely on such promise to repair.

Foreman's Promise to Have Matter Attended to "as Soon as Possible."—In *Dowd v. Erie R. Co. (N. J.)*, 12 R. R. R. 368, 35 Am. & Eng.

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R. Cas., N. S., 368, 57 Atl. 248, it is held that a promise by his foreman to have the matter attended to "as soon as he could" was not, under the circumstances, so indefinite that the servant was not justified in relying on it.

2. Sufficiency of Promise Was Question for Jury.

Absence of Shields on Lubricator Tubes of Locomotive—Foreman's Reply to Complaint, "Well They Must Be Fixed."—In *Cincinnati etc., Ry. Co. v. Robertson* (C. C. A.), 17 R. R. R. 324, 40 Am. & Eng. R. Cas., N. S., 324, 139 Fed. Rep. 519, it appeared that plaintiff, an engineer in defendant's employ, used an engine with lubricator tubes unprotected by shields for several months, until one of the tubes broke and injured his hand, when he notified plaintiff's foreman, and asked him to furnish shields. Plaintiff testified that when he asked for shields, and told the foreman there was none on the engine, he replied, "Well, they must be fixed;" and that he believed the foreman meant that he would supply the shields as soon as he reasonably could; and that, acting on such belief, he remained in the service and used the engine without shields for eight days thereafter, when he was injured by the explosion of another tube. It was held that whether the statement of the foreman constituted a promise to furnish shields, and whether plaintiff was induced thereby to remain in the defendant's employ and use the engine without shields was for the jury.

Foreman's Promise—"I Will Fix Your Machine as Soon as I Get Time."—In *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568, it is held that what defendant's foreman said to plaintiff, the injured employee: "you go on with your work. I will fix your machine as soon as I get time," might be fairly considered as a promise to repair in a reasonable time; and the question whether it was such promise was one for the jury.

Workman Struck by Falling Object While Working beneath Staging Containing Others Working—Superintendent's Promise to "Take Care" of Him—Question for Jury.—In *McKinnon v. Riter-Conley Mfg. Co.*, 186 Mass. 155, 71 N. E. 296, it appeared that a workman was set to work picking up rivets from the ground between two circular concentric iron shells of a gasometer in process of construction, while men were at work on staging above him riveting in place the iron plates that were to form the shells; that such workman went to a superintendent, told him that the work was dangerous and that he did not care to get injured, and asked him if he would not let him do the work at night or on Sunday; that the superintendent said that could not be as he wanted rivets to use immediately and said "you go back to work, and I will take care of you;" that the workman went back to work and in a few minutes was struck on the head by a falling object; and that the superintendent in the meantime had given no directions and done nothing for the workman's protection. It was held that the workman had the right to present to the jury the

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questions of his exercise of proper care for his own safety, his assumption of risk and the negligence of the superintendent.

Working on Bottom of Elevator Shaft—Promise to Look out for Him.—In *Scullane v. Kellogg*, 169 Mass. 544, 48 N. E. 622, an action for the injuries sustained by plaintiff, by an elevator coming down while he was picking up some papers which had been spilled from an upper story of the building on the bottom of the elevator shaft, it was held that if his employer's superintendent sent plaintiff there to such work, and promised to look out for him while he was so engaged, plaintiff was entitled to go to the jury upon the questions of negligence on the part of the superintendent, of due care on his own part, and of his assumption of risk.

3. Insufficient Promises.

Derailment of Handcar—Informed by Superiors of Mere Request for New Car.—In *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, 39 Pac. 85, an action by a railroad employee for personal injuries sustained by reason of defects in a handcar on which he was riding, causing it to leave the tracks while crossing a bridge, it appeared that he was perfectly aware of the defective condition of the handcar, and remained in defendant's employ long after being informed by his superiors that a request merely had been made for a new car; that defendant's foreman told him to use the car with great care, and do the best he could until he could get a new one; that he never refused to use the car, and was never threatened to be discharged if he did not use it, and that he knew the car had jumped the tracks going at a rate of speed much less than that acquired at the time of the accident. It was held that plaintiff assumed the risk.

Insufficiently Block Frog in Yard—Foreman's Conditional Promise.—In *Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326, 33 N. W. 908, it appeared that deceased, a foreman or yardmaster, was familiar with the situation of the tracks in his yard, and knew that a certain frog was not properly blocked, and was dangerous to a person engaged in switching cars, which was one of his duties; and that a section foreman to whom he applied to improve the track at such point, so as to lessen the risk, notified him that he could not do it without orders from his superior, but upon a subsequent application promised "that he would do it if he got the time Saturday afternoon." It was held that such promise was insufficient to bind the railroad, and relieve deceased of the assumption of the risk; and that there was no reasonable connection between such promise and his continuance in the employment.

Improperly Fitted Crank on Candle Machine—Promise to Repair as Soon as Present Order Was Run out.—In *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14, the defect complained of was an improperly fitted crank on a candle machine upon which the servant was employed. His master had ample notice of the existence of the defect and promised to repair it. The court in discussing the

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promise said: "But here the promise was not made to repair generally, which would imply that it was to be done within a reasonable time. The promise was to repair as soon as the present order was run out. How long that would take, whether a week, thirty days, six months or a year after the promise was made, is not found. For aught that appears it may have required thirty days or six months to run out that order. The promise was to repair at the end of that time. That being so, there could have been no inducement influencing the appellee to remain in the service and work with the alleged dangerous machine during that thirty days or six months, expecting the danger to be obviated, as is the case where the promise is to repair generally, implying that it is to be done within a reasonable time."

4. Did Not Constitute Promise.

Injured in Hold of Coal Barge by Reason of Swinging Back of Steam Shovel—Banking of Coal Preventing Escape—Promise to Level Coal in a Minute.—In *McClusky v. Garfield & Proctor Coal Co.*, 180 Mass. 115, 61 N. E. 804, an action by a workman for an injury sustained by him while in the hold of a coal barge, by reason of the swinging back of a steam shovel, it appeared that after the bucket was lowered plaintiff and the foreman would take hold of it at opposite corners and push it to a point from which the coal was to be taken, then both run back to escape the bucket as it swung back; that when they began the coal was level, but as the work went on a bank of coal formed beyond the place where the shovel was working, and plaintiff testified that the coal continued to get steeper and more shifty and he noticed it was harder to run back to avoid the bucket as it swung back. And he then said to the foreman: "Why not take a few shovelfuls out forward and put it on a level and make more room. There is not sufficient room here." The foreman said: "I will in a minute." And the plaintiff answered: "All right." He continued to work, and, on the third shovelful after, slipped down on the steep coal and was struck by the bucket and injured. It was held that such reply of the foreman was not an assurance that the place was safe, but conveyed the information that before the coal would be leveled its surface would become still more steep by the operation of the shovel, and that plaintiff's reply "all right," taken with the fact of his continuing to work, meant that he continued to assume the risk such as it might be.

Injured after Taking Belt Off Pulley—Machinery Suddenly Started again—Mere Promise to Move Machinery Slowly.—In *Dwyer v. Nixon* (C. C. A.), 108 Fed. Rep. 751, it appeared that a servant was asked by his foreman to take a belt off a pulley, the foreman promising to slow down the engine for that purpose, and plaintiff threw the belt off and the machinery stopped entirely, and, while he was engaged in tying the belt up out the way of other moving parts, the machinery was suddenly started, and plaintiff was injured. It was held

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that the statement by the foreman that he intended to move the machinery slowly was not a promise or assurance of the master that defects would be cured or dangerous places made safe.

"It Takes Lots of Red Tape to Do a Thing around This Corner."—In *Simpson v. Weir & Craig Mfg. Co.*, 116 Ill. App. 286, it is held that a conversation which consisted of the plaintiff saying to the foreman of his master, "somebody will get caught there yet," and of the reply by such foreman as follows: "It takes lots of red tape to do a thing around this corner or around this place rather," cannot be construed as a promise to make repairs upon which the employee may rely and continue in the performance of his perilous duties.

Rusty Wire Rope—Statement That It Had Been Insured for Five Years.—In *Purcell Mill & Elevator Co. v. Kirkland* (Ind. Terr. App.), 47 S. W. 311, it appeared that an employee, before using a wire rope, the breaking of which caused the injury sued for, informed his employer that it was a little rusty, and the master replied that it was all right, when the employee suggested that a new rope be gotten, whereupon the employer said, "that might do," followed by the statement that the rope had been insured for five years. It was held that the employer had made no promise to supply a new rope.

Hole in Turntable—Merely Seeing Carpenter Measuring It.—In *Cowles v. Chicago, etc., Ry. Co.*, 102 Iowa 507, 71 N. W. 580, it appeared that a helper at a roundhouse knew of the existence of a hole in the turntable and had noticed its location every night that he had worked there up to the time of the accident, but had entered no complaint. It was held that he assumed the risk of work on such defective turntable, though he may have seen the bridge carpenter measuring it; there being no promise to repair it.

Defective Engine Step—Attempt of Engineer to Repair—"I Will Have It Fixed"—Fireman Injured.—In *Gulf, etc., Ry. Co. v. Garren* (Tex.), 8 R. R. R. 384, 31 Am. & Eng. R. Cas., N. S., 384, 74 S. W. 897, it appeared that some time before plaintiff, a fireman, was injured in attempting to use a defective engine step, the engineer had noticed that it was defective, and, after having made an ineffectual attempt to repair it, had turned it under the engine, saying, "I will have it fixed." It was held that this did not constitute a promise or assurance to repair, preventing plaintiff from assuming the risk from using it.

I. REQUEST TO CONTINUE WORK, NECESSITY OF.

1. In General.

And, besides making the servant a promise to remove the danger complained of, the master must expressly or impliedly request the servant to continue in his employment until the time for the fulfillment of the promise. *Cudahy Packing Co. v. Skoumal* (C. C. A.), 125 Fed. Rep. 470; *Gulf, etc., Ry. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561.

Must Be Express or Implied Promise or Request.—Where there is

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no express or implied promise to repair or request to continue in the service, the employee assumes the risks incident to an employment conducted with machinery, implements, or appliances known by himself as well as the employer to be defective and dangerous. So held in *Gulf, etc., Ry. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561.

2. Implied Request to Continue to Work.

But when the master has knowledge of the defects; and promises to repair the same as soon as possible, he impliedly requests the servant to continue to work and promises that he, the master, will take upon himself the responsibility of any accident that may occur by reason of such defects within a reasonable time after such promise. So held in *Illinois Cent. R. Co. v. Creighton*, 83 Ill. App. 165.

IV. RELIANCE ON MASTER'S PROMISE.

A. NECESSITY OF RELIANCE ON PROMISE.

1. General Rule.

In order that a servant may be relieved from the operation of the doctrine of assumption of risk, it must appear that he contemplated danger to himself from the defect or condition complained of, which he was not willing to incur, and that by the promise of his master to repair the defect or remedy the dangerous condition he was induced to continue in the service, when otherwise he would not have done so.

United States.—*Cudahy Packing Co. v. Skoumal* (C. C. A.), 125 Fed. Rep. 470; *Detroit Crude-Oil Co. v. Grable* (C. C. A.), 94 Fed. Rep. 75; *Gowen v. Harley* (C. C. A.), 56 Fed. Rep. 973; *Highland Boy Gold Min. Co. v. Pouch* (C. C. A.), 124 Fed. Rep. 148; *Hough v. Texas & Pac. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612.

Delaware.—*Boyd v. Blumenthal & Co.*, 3 Penn. (Del. Sup'r Ct.), 564; *Huber v. Jackson & Sharp Co.*, 1 Marv. (Del. Sup'r Ct.), 374; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del. Sup'r Ct.), 525.

Illinois.—*Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484; *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714; *Parnee Coal Co. v. Boyce*, 79 Ill. App. 469; *Tesmer v. Boehm*, 58 Ill. App. 609.

Indiana.—*Daugherty v. Midland Steel Co.*, 23 Ind. App. 78; *East Chicago Iron & Steel Co. v. Williams*, 17 Ind. App. 573; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Romona Oolitic Co. v. Phillips*, 11 Ind. App. 118, 39 N. E. 96.

Iowa.—*Pieart v. Chicago, etc., Ry. Co.*, 82 Iowa 148, 47 N. W. 1017.

Kansas.—*Atchison, etc., R. Co. v. Midgett*, 1 Kan. App. 138, 40 Pac. 995; *Southern Kan. Ry. Co. v. Croker*, 41 Kan. 747, 21 Pac. 785.

Kentucky.—*Breckenridge Co. v. Hicks*, 94 Ky. 362, 22 S. W. 554; *Bates-Rogers Const. Co. v. Dunn* (Ky.), 93 S. W. 1032.

Maine.—*Babb v. Oxford Paper Co.*, 99 Me. 298, 59 Atl. 290.

Maryland.—*Maryland Steel Co. v. Engleman*, 101 Md. 661, 61 Atl. 314.

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Massachusetts.—Dailey *v.* Fiberloid Co., 186 Mass. 318, 71 N. E. 554; In Nealand *v.* Lynn & Boston R. Co., 173 Mass. 42, 53 N. E. 137; Levesque *v.* Janson, 165 Mass. 16, 42 N. E. 335; McClusky *v.* Garfield & Proctor Coal Co., 180 Mass. 115, 61 N. E. 804.

Michigan.—Cantwell *v.* Brennan & Co., 125 Mich. 349, 84 N. W. 299; Roux *v.* Blodgett & Davis Lumber Co., 85 Mich. 519, 48 N. W. 1092; Schlacker *v.* Ashland Iron Min. Co., 89 Mich. 253, 50 N. W. 839.

Minnesota.—Harris *v.* Hewitt, 64 Minn. 54, 65 N. W. 1085; Rothenberger *v.* Northwestern Consolidated Milling Co., 57 Minn. 461, 59 N. W. 531; Shalgren *v.* Red Cliff Lumber Co. (Minn.), 104 N. W. 531; Smith *v.* Backus Lumber Co., 64 Minn. 447, 67 N. W. 358; Vion *v.* Brooks-Scanlon Lumber Co. (Minn.), 108 N. W. 891; Wilson *v.* Winona & St. P. R. Co., 37 Minn. 326, 33 N. W. 908.

Missouri.—Conroy *v.* Vulcan Iron Works, 6 Mo. App. 102; Holoran *v.* Union Iron Foundry Co., 133 Mo. 470, 35 S. W. 260; Meyer *v.* Gunlach-Nelson Mfg. Co., 67 Mo. App. 389; Muirhead *v.* Hannibal & St. Jo. Ry. Co., 19 Mo. App. 634; Whaley *v.* Coleman, 113 Mo. App. 594.

New Hampshire.—Bodwell *v.* Nashua Mfg. Co., 70 N. H. 390, 47 Atl. 613.

New Jersey.—Andrecsik *v.* New Jersey Tube Co., 73 N. J. L. 664, 63 Atl. 718.

New York.—Rice *v.* Eureka Paper Co., 174 N. Y. 385, 66 N. E. 979.

Oklahoma.—Neeley *v.* Southwestern Cotton Seed Oil Co., 136 Okl. 356, 75 Pac. 302.

Pennsylvania.—Brownfield *v.* Hughes, 128 Pa. St. 194, 18 Atl. 340; Fick *v.* Jackson (Pa.), 3 Pa. Sup'r Ct. 278; Madara *v.* Pottsville Iron & Steel Co., 160 Pa. St. 109, 28 Atl. 639.

Tennessee.—Brewer *v.* Tennessee Coal, etc., Co., 97 Tenn. 615, 37 S. W. 549; Railroad Co. *v.* Kenley, 92 Tenn. 207, 21 S. W. 326.

Texas.—City of Houston *v.* Owen (Tex. Civ. App.), 67 S. W. 788; Hillje *v.* Hettich, 95 Tex. 321, 65 S. W. 491; International & G. N. Ry. Co. *v.* Turner, 3 Tex. Civ. App. 487, 23 S. W. 146; Missouri, etc., Ry. Co. *v.* Baker, 35 Tex. Civ. App. 542, 81 S. W. 67; Southern Pac. Co. *v.* Lasch, 2 Tex. Civ. App. 68, 21 S. W. 563; Texas, etc., R. Co. *v.* Bingle, 91 Tex. Supt. Ct. 287, 42 S. W. 971; Texas & P. Ry. Co. *v.* Nichols (Tex. Civ. App.), 92 S. W. 411.

Virginia.—Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991.

Washington.—Crooker *v.* Pacific L. & M. Co., 29 Wash. 30, 69 Pac. 359.

Wisconsin.—Coolidge *v.* Hallauer, 126 Wis. 244, 105 N. W. 568; Corcoran *v.* Milwaukee Gas Light Co., 81 Wis. 191, 51 N. W. 328; Erdman *v.* Illinois Steel Co., 95 Wis. 6, 69 N. W. 993; Showalter *v.* Fairbanks, Morse & Co., 88 Wis. 376, 60 N. W. 257.

2. Reliance on Promise to Inspect and Master's Superior Judgment.
In Schlacker *v.* Ashland Iron Min. Co., 89 Mich. 253, 50 N. W.

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839, it is held that an employee on entering into an employment takes the ordinary risks attending the service, but when he complains of what appears to him to be an impending danger in a position to which he has been ordered, and notifies the master of the danger, and asks to be relieved, the master cannot refuse to relieve him and still insist upon his continuing the work in that position; and, when the servant remains at the master's direction, waiting for an inspection which the latter has promised but neglected to make, relying upon such promise and the master's superior judgment, and fearing the consequences of disobedience, and is injured, the master cannot then be allowed to say, "you assumed that risk when you entered my employment."

3. Merely Imperfections in Work Done by Defective Appliance Contemplated.

The rule that a promise to repair relieves the servant of the assumption of risk does not apply to a case where neither the master nor servant contemplate any additional danger to the servant from the use of the defective appliance, but only imperfections in the work done by it. So held in *Tesmer v. Boehm*, 58 Ill. App. 609.

4. Servant Not Complaining on His Own Account.

In *Lewis v. New York, etc., R. Co.*, 153 Mass. 73, 26 N. E. 431. it appeared that an employee complained to his employer, but not on his own account, of the defective condition of the premises on which he was employed, and, upon an assurance, which did not induce him to remain, that the necessary repairs would be made, continued in the employment with full knowledge of the risk, and was injured by reason of such defect. It was held that he assumed the risk.

5. Complaining Merely for Benefit of Master's Business.

Where the servant's complaint and the master's undertaking to repair are merely to facilitate the transaction of the master's business, and not for the protection of the servant, there is not an assumption of the risk by the master. So held in *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596, 55 S. W. 362.

6. Bare Suspicion That Promise Will Not Be Fulfilled.

If a servant is assured, from time to time, that a smooth, slippery, and, therefore, unsafe floor for him to stand on in front of a machine, will be replaced by a safer one, he will have the right to rely on such assurance, and such reliance can not be overcome by a fact or facts which may create a bare suspicion that the change will not be made. So held in *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714.

Many Similar Promises Broken by Master.—But in *City of Houston v. Owen* (Tex. Civ. App.), 67 S. W. 788, it is held that a promise made to an employee to repair an appliance or work place will not justify the employee in remaining at work exposed to the danger from the lack of repairs, where, by reason of the fact that many

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like promises have been made by his employer and always broken, he must know that there is no intention to make the repairs.

7. Illustrations of General Rule.

Defect in Step at End of Engine Tank and Absence of Railing—Jerk of Engine—Fall of Switchman.—In *Lyttle v. Chicago, etc., R. Co.*, 84 Mich 289, 47 N. W. 571, it appeared that plaintiff, a switchman, standing on the step at the end of the engine tank, to uncouple some cars which were being “kicked” upon a side track, by reason of a defect in the step, and because there was no railing to hold to, was thrown off by a jerk of the engine and injured. He had complained of these defects, and he, with others, had notified the yardmaster that they would quit if they were not remedied. They were persuaded to remain by a promise that the defects would be remedied. This was not done. It was held that if they were persuaded to remain by reason of this promise the company was thereby rendered liable.

Freight Conductor Thrown from Way Car—Absence of Hand Rail Removed for Repairs Pursuant to His Instructions—Failure to Protest.—In *Shackelton v. Manistee, etc., R. Co.*, 107 Mich. 16, 64 N. W. 728, it appeared that a freight conductor was thrown from a way car and killed by reason of the absence of a hand rail, which, pursuant to his instructions, had been removed for repairs a few days before the accident. Soon after its removal, defendant's assistant superintendent, noticing the defect, had directed deceased to see that it was remedied. Then deceased told the workman who had removed the rail to repair and replace it, which the latter promised, but neglected to do, and deceased continued to use the car without protest, up to the time of the accident. It was held that deceased assumed the risk, as he was not induced to continue to use the defective car by reason of the master's promise to repair.

Snow on Depot Platform—Removal Requested Merely for Comfort of Injured Agent and Passengers.—In *Texas & P. Ry. Co. v. Nichols* (Tex. Civ. App.), 92 S. W. 411, it appears that a depot employee was injured by slipping on snow on the platform; that he had complained of its presence to the depot agent, and the latter had promised to have it removed; but it also appeared that he had requested the removal of the snow merely for the comfort of himself and the passengers, and not from fear of danger from it. It was held that such promise did not relieve him from assumption of the risk.

Fireman of Piledriver Engine Jolted Off Its Flat Car—Struck by Moving Train—Failure to Replace End of Engine House Used as Handhold.—In *Southern Pac. Co. v. Lasch*, 2 Tex. Civ. App. 68, 21 S. W. 563, it appeared that a fireman of a piledriver engine, while shoveling coal into the engine from a connected box car in which the coal was kept, was injured by being jolted off the flat car upon which was the piledriver engine, by the striking of a moving train against it. The piledriver engine was near one end of the flat car, and was usually enclosed by a house with a sliding door at the end next to the coal

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car, in which the fireman might stand while shoveling coal, and protect himself from falling when jolted by grasping the end of the house. When the accident occurred that end of the house was entirely open. Plaintiff had been in the employ of the defendant company as piledriver engine fireman for a year or more. He alleged that that defendant had promised to replace the end of the house within a very short time, as had always been the custom before when it had been removed, and that relying upon said promise and custom, he continued to remain in plaintiff's employ, discharging such duties. But it also appeared that prior to June 3d the end of the house was taken out; that plaintiff went to work as fireman on June 5th; and that the injury occurred on Friday, June 7th, and the evidence showed no promise to replace the end of the house on any named day, the inference from it being that the foreman would fix it as soon as he got through the work he was then at. The custom of defendant's employees was to replace the end of the house on Sunday. It was held that plaintiff was not induced to remain in his employment by any promise, expressed or implied, to replace the end of house; and that he, therefore, assumed the obvious risk created by its absence.

Insufficient Engine Crew—Delay of Trains—Failure of Yardmaster to Complain of His Own Risk.—In *International & G. N. Ry. Co. v. Turner*, 3 Tex. Civ. App. 487, 23 S. W. 146, it appeared that there came up a dispute between a railroad yardmaster and a vice principal about the delay of trains, and the former explaining that he could not possibly do the work with one man to handle the engine, without any fireman or assistant, and the vice principal promised to see to getting him a fireman at once. The yardmaster neither complained of his own risk nor asked for protection. The fireman was to be furnished to forward the employer's business, and not to protect the yardmaster, and it was not shown that the latter was induced to continue his work by anything said by such vice principal. It was held that this did not show anything that relieved the yardmaster of the assumption of the risks arising from the insufficiency of his force.

Moving Heavy Box from One Car to Another—Request for Skids Made Merely from Considerations of Convenience.—In *Gowen v. Harley* (C. C. A.), 56 Fed. Rep. 973, it appeared that plaintiff and another employee of defendant were charged with the daily duty of moving a box weighing 250 pounds a distance of five feet from one railway car to another, the surface of the earth between the cars being smooth and hard, and the floors of the cars at the height of the shoulders of a man standing between them. Plaintiff had asked for and been promised skids upon which to slide the box from one car to another, but he made such request merely from considerations of convenience, and not because he thought any other method of moving the box dangerous. It was held that such promise did not relieve him from his assumption of the risks of moving the box without the use of the skids.

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Fall of Roof of Railroad Pumping Station—Injured While Walking on It in Extinguishing Fire—Presumption as to Scope of Complaint.—In *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556, 78 S. W. 172, it is held that where an employer, who was injured by the falling of the roof of a railroad pumping station at which he was employed while he was walking thereon in extinguishing a fire, had notified his employer's superintendent that the roof was defective, but there was no showing that such notice was to the effect that the roof was so defective as to be unsafe to go upon, it would be presumed that the notice referred only to the defects affecting its purpose as a roof, so that the promise to repair did not constitute an undertaking to make the roof safe to walk on.

B. DEGREE AND IMMINENCE OF DANGER AS AFFECTING RIGHT TO RELY ON PROMISE.

1. General Rule.

If the danger to which the servant will be exposed by reason of the defect or condition complained of is so great and imminent that no reasonably prudent man would be willing to continue in the employment exposed to it until the time for the fulfillment of the master's promise, such promise cannot have the effect of suspending the servant's assumption of the risk, as the servant will not be entitled to rely upon it as a protection.

United States.—*Cudahy Packing Co. v. Skoumal* (C. C. A.), 125 Fed. Rep. 470; *Musser-Sauntry, etc., Co. v. Brown* (C. C. A.), 126 Fed. Rep. 140; *Roceia v. Black Diamond Coal Min. Co.* (C. C. A.), 121 Fed. Rep. 451.

Arkansas.—*St. Louis, etc., Ry. Co. v. Kelton*, 55 Ark. 483, 18 S. W. 933.

California.—*Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

Illinois.—*Chicago, Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *City of Kinmundy v. Anderson*, 103 Ill. App. 457; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Sattley Mfg Co. v. Wendt*, 116 Ill. App. 375; *Simpson v. Weir & Craig Mfg. Co.*, 116 Ill. App. 286.

Indiana.—*Indianapolis Union Ry. Co. v. Ott*, 11 Ind. App. 564, 33 N. E. 842, 39, N. E. 529; *Indianapolis, etc., Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824.

Kansas.—*Atchison, etc., Co. v. Midgett*, 1 Kan. App. 138, 40 Pac. 995; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Southern Kan. Ry. Co. v. Croker*, 41 Kan. 747, 21 Pac. 785.

Kentucky.—*McDowell v. Chesapeake, etc., R. Co.* (Ky.), 8 S. W. 871; *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556, 78 S. W. 172.

Maryland.—*Maryland Steel Co. v. Engleman*, 101 Md. 661, 61 Atl. 314.

Massachusetts.—*Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530;

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Levesque v. Janson, 165 Mass. 16, 42 N. E. 335; *Nealand v. Lynn & Boston R. Co.*, 173 Mass. 42, 53 N. E. 137.

Minnesota.—*Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357; *Gray v. Red Lake Lumber Co.*, 85 Minn. 24, 88 N. W. 24; *Harris v. Hewitt*, 64 Minn. 54, 65 N. W. 1085; *Rothenberger v. Northwestern Consolidated Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Schlitz v. Pabst Brewing Co.*, 57 Minn. 303, 59 N. W. 188; *Shalgren v. Red Cliff Lumber Co. (Minn.)*, 104 N. W. 531; *Smith v. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358.

Missouri.—*Conroy v. Vulcan Iron-Works*, 6 Mo. App. 102.

Montana.—*Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, 39 Pac. 85.

Nevada.—*Taylor v. Nevada-California-Oregon Ry.*, 26 Nev. 415, 69 Pac. 858.

New Jersey.—*Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835.

Pennsylvania.—*Brownfield v. Hughes*, 128 Pa. St. 194, 18 Atl. 340; *Fick v. Jackson*, 3 Pa. Sup'r Ct. 378; *Webster v. Monongahela Coal & Coke Co.*, 201 Pa. St. 278, 50 Atl. 964.

Texas.—*Southern Pac. Co. v. Lasch*, 2 Tex. Civ. App. 68, 21 S. W. 563; *Texas, etc., R. Co. v. Bingle*, 91 Tex. Sup. Ct. 287, 42 S. W. 971.

Virginia.—*Newport News Pub. Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

Washington.—*Johnson v. Anderson & Middleton Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Leeson v. Saw-Mill Phoenix*, 41 Wash. 423, 83 Pac. 891.

West Virginia.—*Graham v. Newberg, etc., Co.*, 38 W. Va. 273, 18 S. E. 584.

Wisconsin.—*Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568; *Corcoran v. Milwaukee Gas Light Co.*, 81 Wis. 191, 51 N. W. 328; *Curran v. Strange Co.*, 98 Wis. 398, 74 N. W. 377; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993; *Nelson v. Shaw*, 102 Wis. 274, 78 N. E. 417; *Showalter v. Fairbanks, Morse & Co.*, 88 Wis. 376, 60 N. W. 257; *Yerkes v. Northern Pac. Ry. Co.*, 112 Wis. 184, 88 N. W. 33.

2. Other Statements and Illustrations of General Rule.

The general rule finds an exception in cases where the defect is so obvious and the danger therefrom so imminent that none but a reckless man would continue to use the appliance in its defective condition. So held in *Atchison, etc., Ry. Co. v. Sledge (Kan.)*, 74 Pac. 1111, 10 R. R. R. 229, 33 Am. & Eng. R. Cas., N. S., 229.

If an employer promises to repair defective machinery or remedy dangerous conditions, an employee may rely on such promise and continue to use the machinery without an implication of the assumption of the risk, unless the use of the machinery involves such recklessness that no reasonably prudent man would voluntarily encounter.

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So held in *Newport News Pub. Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821.

Immediate Danger Not Threatened.—In *Brownfield v. Hughes*, 123 Pa. St. 194, 18 Atl. 340, it is held that a servant who continues to use a machine which he knows to be dangerous takes upon himself the risk of injury therefrom, unless the risk does not threaten immediate danger, and the employee continues in the same employment in reliance upon a promise of the master to remedy the defect.

Certain Danger.—In *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835, it is held that where the master or his representative promises a servant in his employment to remedy and obviate a certain danger to which the servant has called his attention, such promise does not relieve the servant from the further assumption of the risks of danger if the risks or dangers be obvious or incidental to his employment, or of risks, the danger from which he, in the exercise of ordinary care, could discover or know, and the master will not be liable for an injury to the servant resulting from such risks, but if the employment of the servant be in such a place or under such circumstances that he cannot know of the danger or it is not obvious to him, he can continue in the employment under the assumption that the promise will be performed for his protection, and the master will be liable for injury to him resulting from the danger arising from the default of the master in the nonperformance of the promise.

Conduct of Man of Ordinary Prudence the Test.—In *Schlitz v. Pabst Brewing Co.*, 57 Minn. 303, 59 N. W. 188, it is held that where the dangerous condition of an instrumentality furnished servant to do his work is known to both the master and servant, and the latter, upon his objecting to continuing its use, is induced to do so for a short time by the request of the master for his own convenience and purposes, and his promises that at the end of such time the use shall be discontinued, the servant does not during such time assume the risk incident to such dangerous condition, unless it be so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it.

In *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, 39 Pac. 85, it is held that if machinery is so obviously dangerous that no ordinarily prudent person would assume the risk of using it, and the employee does use it, knowing its dangerous condition, and is injured by reason thereof, the master is not liable, although he had promised to remedy the defects which caused the injury.

Defective Foot-Board of Switch Engine.—In *Yerkes v. Northern Pac. Ry. Co.*, 112 Wis. 184, 88 N. W. 33, it appeared that the foot-board, ten inches wide, at the back of a switch engine, had become bent at one corner so that the outer edge was from two to three inches lower than the inner edge, but the engine was provided with a hand hold by means of which one could protect himself from fall-

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ing, and it had been used in that condition by the switching crew at least two nights before the accident. It was held that the danger from the defect was not so imminent, constant, and unavoidable but that a reasonably prudent man might, without assuming the risk, continue to use the engine pending a promise to repair.

Servant Ordered to Operate Defective Machine More Rapidly than He Had Ever Done.—Where the employer, without fulfilling his promise to repair a machine, ordered the servant to operate the machine more rapidly than he ever had done while it had been in the defective condition, if the increased peril from the more rapid operation was not so glaringly obvious that no prudent man would have undertaken it under the promise and direction, the servant did not assume the risk, and the master was liable for the resulting injury to the employee. So held in *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

Hand Caught in Shaving's Pocket of Shaving Baler—Loose Roller Worn Out of Shape.—Plaintiff's hand was caught in the shaving's pocket of a shaving baler, and was there crushed by its advancing packer bar. The charge of his employer's negligence was that the loose roller over which that bar passed was worn off from its cylindrical form; and that thereby a plate which passed over the bar as it advanced was caused to jump up and catch and hold plaintiff's hand while down in the pocket to adjust the board used to evenly apply the impact of the bar against the shavings. It was held that if plaintiff complained to his employer of such defect and the latter promised to correct it, and directed him to continue his work until the repairs could be made, and he, in reliance upon such promise, continued to work with the defective machine without harm for 10 days, the danger was not so great, nor the risk so imminent, as to impose upon him, as a matter of law, the assumption of the risk involved. *Shalgren v. Red Cliff Lumber Co.* (Minn.), 104 N. W. 531.

Turning Lathe Operator Injured—Broken Socket.—In *Leeson v. Saw-Mill Phoenix*, 41 Wash. 423, 83 Pac. 891, it is held that an operator of a turning lathe is by his master's promise to repair relieved from the assumption of risks from a broken socket, where it appears that the superintendent told him to take the socket to the office and it would be repaired, which he did several times, but returned with it and used it unrepaired, upon an urgent request of the foreman, upon his promise to repair it as soon as the job was completed, and where the danger was not so imminent that a workman of ordinary prudence would have regarded it as so hazardous as to have refused.

Bolt Cutter Injured While Shifting Belt upon Machine—Unprotected Gearing.—In *Dowd v. Erie R. Co.* (N. J.), 12 R. R. R. 368, 35 Am. & Eng. R. Cas., N. S., 368, 57 Atl. 248, it appeared that plaintiff, an experienced bolt cutter, was injured while shifting the belt upon the bolt-cutting machine, by his hand slipping from the shift-

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ing lever and coming in contact with the unprotected gearing. He had worked at the identical machine, by his hand slipping from the shifting lever and coming in contract with the unprotected gearing. He had worked at the identical machine at another shop of defendant, but the gearing was then protected by a cover. Upon his complaint of the danger from the lack of a cover the foreman had promised to have it attended to as soon as he could. It was held that the danger was not so imminent as to compel the conclusion that the plaintiff was negligent in continuing to work, and to require the court to take the case from the jury.

Vicious Horse and Old Rotten Harness.—In *Levesque v. Janson*, 165 Mass. 16, 42 N. E. 335, an action for injuries sustained by defendant's employee by reason of the breaking of the harness upon defendant's horse while plaintiff was driving, it appeared there was such a combination of vicious horse and old rotten harness that an accident was reasonably to be expected, and that plaintiff was guilty of negligence in using them together. It was held that defendant's promise that he would fix the harness or get a new one was not such an excuse as to prevent plaintiff from assuming the risk from using the harness on such horse.

Circular Saw Cracked.—In *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993, it is held that the danger of a saw, four feet in diameter with a crack three inches from the outside, flying to pieces when let down upon large bars or plates of iron while running at a speed of 1,700 revolutions per minute, with sufficient force to cut the bars or plates in two, was so obvious, immediate, and constant that an employee engaged in operating it was guilty of negligence in continuing at his work with knowledge of the defect, even in reliance upon the promise of the master to remedy it; and the unsupported testimony of the employee, thirty-five years old and of fourteen years' experience with machinery, that he did not know of the existence of such danger, is insufficient to support a finding of the jury that he neither knew or ought to have known of it.

Obviousness of Peril and Employee's Appreciation.—Whether a servant in continuing to operate a defective machine under a promise to repair, acted as a reasonable and prudent man would act, and whether the peril was so obvious that no prudent man would hazard obedience to the orders given, and whether the employee understood and appreciated such peril, are generally questions of fact for the jury. So held in *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

At Work on Dangerous Pile of Stones.—In *Schiglizzo v. Dunn*, 211 Pa. St. 253, 60 Atl. 724, an action by an employee against his employer to recover damages for personal injuries, it was held that the case is for the jury where it appears that plaintiff was at work on a dangerous pile of stones; that he had protested to defendant's superintendent of the dangerous condition of the place where he was working and refused to work; and that the superintendent had repri-

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manded him for his refusal to work, and had ordered him to go on, promising to remove the danger; as it could not be held as matter of law that the danger was too obvious and imminent to be encountered.

Rock Overhanging Work Place.—In *Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454, an action under the employers' liability act of 1887, against a town for causing the death of A. while he was employed in raking stones down a hillside upon land belonging to the town, that they might be gathered and broken up in a stone crusher for use in macadamizing its streets, it appeared that above A. was a large overhanging rock which looked safe from where he was at work, but which had a large crack behind it caused by blasting done two days before and that this rock fell a few minutes after A. went to work, and crushed him. There was evidence that defendant's superintendent put A. to work where he was hurt; that the former had been told that the rock which fell upon A. could and ought to be barred down without further blasting; and that he had said he would see to it. It was held that the question of assumption of risk was for the jury.

Loose Place in Roof of Mine—Injured on Next Day—Question for Jury.—In *Taylor v. Star Coal Co.*, 110 Iowa 40, 81 N. W. 249, it appeared that plaintiff, a miner, complained of the danger from a loose place in the roof of a mine, within a few feet of where he was working, and the superintendent directed him to continue work, and promised to remedy the danger, and on the next day, without the roof being repaired, plaintiff was injured by reason of its fall, and the danger had not been so apparent that a man of reasonable prudence would have left the employment. It was held that the question whether plaintiff assumed the risk was for the jury.

Engine Tender Rolling Too Much on Its Trucks—Increasing Weakness of Tender Springs—Derailment of Engine Five Days after Second Promise.—In *Taylor v. Nevada-California-Oregon Ry.*, 26 Nev. 415, 69 Pac. 858, it appeared that a plaintiff, a railroad engineer notified his employer that his engine tender, which was practically new, was rolling too much on its trucks, and that it was getting dangerous, and received a promise that the defect would be remedied. Four days later he again gave notice that the defect ought to be remedied at once, and received a similar promise. The defect consisted of a gradually increasing weakness of the tender's springs, which, no repairs being made, resulted, five days after the second notice, in the derailment of the engine and plaintiff's consequent injury, the front bolster of the tender having caught in the front truck and lifted it from the track. It was held that the question whether the danger was so imminent as to require plaintiff to discontinue work, notwithstanding the promise to repair, was for the jury.

Sawmill Carriage Rider Injured—Promise to Furnish Another and Competent Sawyer.—In *Curran v. Stange Co.*, 98 Wis. 598, 74 N. W.

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377, it appeared that plaintiff, after working one night in defendant's sawmill as carriage rider, informed the superintendent that the sawyer was incompetent. The next evening he went to work with the same sawyer in charge, in reliance, as he claimed, upon the superintendent's promise, made that morning, to get another sawyer, and was injured about two hours thereafter by reason of the unskillful manner in which the carriage was operated. It was held that it was a question for the jury whether plaintiff had assumed the risk arising from the incompetency of the sawyer, either by continuing in the employment after the lapse of a reasonable time for the change of sawyers to be made as promised, or because the danger was so great and immediate that he was not justified in working at all the second evening.

Minor Killed While Working on Dangerously Narrow Platform—Question for Jury.—In *Madara v. Pottsville Iron & Steel Co.*, 160 Pa. St. 109, 28 Atl. 639, an action by a father to recover for the death of his minor son, it was held that it was proper to submit the case to the jury where there was evidence that the boy was killed while working on a dangerously narrow platform, and that the father had complained to the superintendent of the danger, and had only refrained from removing his son by reason of the promise of the superintendent that another workman should be put in the boy's place.

Right to Ruling That Master Was Liable.—In *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530, it appeared that machinery upon which a servant was employed became defective and dangerous; that the master promised the servant the defect should be remedied; and that the servant continued to attend to the machinery knowing that the defect had not been repaired, and was injured by reason of the defect. It was held that the servant was not entitled to a ruling that his master was liable.

C. QUESTION FOR JURY WHETHER DANGER TOO GREAT TO PERMIT RELIANCE ON PROMISE.

Whether the danger is too great to entitle a reasonably prudent servant to continue in the service in reliance on his master's promise to remove it is generally a jury question.

Nevada.—*Taylor v. Nevada-California-Oregon Ry.*, 26 Nev. 415, 69 Pac. 858.

New York.—*Laning v. New York Cent. R. Co.*, 49 N. Y. 521.

Rhode Island.—*Collins v. Harrison*, 25 R. I. 489, 56 Atl. 678.

Texas.—*International, etc., Ry. Co. v. Williams*, 82 Tex. 342, 18 S. W. 700.

Virginia.—*Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

D. TEST OF RIGHT TO RELY ON PROMISE.

The right of the servant to continue in the service in reliance on the

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master's promise to repair the defect or remedy the condition complained of is to be measured by what would be the conduct of a reasonably prudent man under the same circumstances.

United States.—Cudahy Packing Co. *v.* Skoumal (C. C. A.), 125 Fed. Rep. 470; Parody *v.* Chicago, etc., Ry. Co. (C. C. A.), 15 Fed. Rep. 205; Roceia *v.* Black Diamond Coal Min. Co. (C. C. A.), 121 Fed. Rep. 451.

Illinois.—Illinois Steel Co. *v.* Mann, 100 Ill. App. 367.

Kentucky.—Louisville Hotel Co. *v.* Kaltenbrun (Ky.), 82 S. W. 378; Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357.

Missouri.—Whaley *v.* Coleman, 113 Mo. App. 594.

Texas.—Texas, etc., R. Co. *v.* Bingle, 91 Tex. Sup. Ct. 287, 42 S. W. 971.

E. RESUMPTION OF RISK AFTER LAPSE OF REASONABLE TIME FOR FULFILLMENT OF PROMISE.

1. General Rule.

If the master's promise is not performed at the time fixed for its fulfillment or within reasonable time for its fulfillment, the servant by continuing in the service thereafter impliedly reassumes the risk, and the promise cannot render the master liable for injuries sustained by the servant after the expiration of the time for its performance.

United States.—Barney Dumping Boat Co. *v.* Clark (C. C. A.), 112 Fed. Rep. 921; Detroit Crude-Oil Co. *v.* Grable (C. C. A.), 94 Fed. Rep. 75; Hough *v.* Texas & Pac. Ry. Co., 100 U. S. 213, 25 L. Ed. 612; Parody *v.* Chicago, etc., Ry. Co. (C. C. A.), 15 Fed. Rep. 205.

Alabama.—Bridges *v.* Tennessee Coal, Iron & R. Co., 109 Ala. 287, 19 So. 495; Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216; Woodward Iron Co. *v.* Jones, 80 Ala. 123.

Colorado.—Davis *v.* Graham, 2 Colo. App. 210, 29 Pac. 1007.

Delaware.—Boyd *v.* Blumenthal & Co., 3 Penn. (Del. Sup'r Ct.), 564; Huber *v.* Jackson & Sharp Co., 1 Marv. (Del. Sup'r Ct.), 374; Ray *v.* Diamond State Steel Co., 2 Penn. (Del. Sup'r Ct.), 525.

Idaho.—Harvey *v.* Alturas Gold Min. Co. (Idaho), 31 Pac. 819.

Illinois.—Chicago, Anderson Pressed Brick Co. *v.* Sobkowick, 148 Ill. 573, 36 N. E. 572; City of Kinmundy *v.* Anderson, 103 Ill. App. 457; Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714; Gunning System *v.* Lapointe, 212 Ill. 274, 72 N. E. 393; Illinois Cent. R. Co. *v.* Weiland, 67 Ill. App. 332; Illinois Steel Co. *v.* Mann, 170 Ill. 200, 48 N. E. 417; Missouri Furnace Co. *v.* Abend, 107 Ill. 44; Parnee Coal Co. *v.* Boyce, 79 Ill. App. 469; Sattley Mfg. Co. *v.* Wendt, 116 Ill. App. 375; Sendzikowski *v.* McCormick Harvesting Machine Co., 58 Ill. App. 418; Shickle, etc., Iron Co. *v.* Glon, 106 Ill. App. 645; Swift & Co. *v.* Madden, 165 Ill. 41, 45 N. E. 979.

Indiana.—East Chicago Iron & Steel Co. *v.* Williams, 17 Ind. App. 573; Indianapolis Union Ry. Co. *v.* Ott, 11 Ind. App. 564, 38 N. E.

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842, 39 N. E. 529; *Romona Oolitic Co. v. Phillips*, 11 Ind. App. 118, 39 N. E. 96; *Standard Oil Co. v. Helmick*, 148 Ind. 457, 48 N. E. 14.

Iowa.—*Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662; *Foster v. Chicago, etc., Ry. Co.*, 127 Iowa 84, 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538, 102 N. W. 422.

Kansas.—*Atchison, etc., Co. v. Midgett*, 1 Kan. App. 138, 40 Pac. 995; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 722.

Kentucky.—*Breckenridge Co. v. Hicks*, 94 Ky. 362, 22 S. W. 554; *Brown v. Levy*, 108 Ky. 163, 55 S. W. 1079; *Reiser v. Southern Planing Mill & Lumber Co.*, 114 Ky. 1, 69 S. W. 1085.

Minnesota.—*Anderson v. Fielding*, 92 Minn. 42, 99 N. E. 357; *Gray v. Red Lake Lumber Co.*, 85 Minn. 24, 88 N. W. 24; *Harris v. Hewitt*, 64 Minn. 54, 65 N. W. 1085; *Rothenberger v. Northwestern Consolidated Milling Co.*, 57 Minn. 461, 49 N. W. 531; *Shalgren v. Red Cliff Lumber Co. (Minn.)*, 104 N. W. 531; *Smith v. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358.

Missouri.—*Conroy v. Vulcan Iron-Works*, 6 Mo. App. 102; *Meyer v. Gunbach-Nelson Mfg. Co.*, 67 Mo. App. 389; *Stalzer v. Dold Packing Co.*, 84 Mo. App. 566; *Whaley v. Coleman*, 113 Mo. App. 594.

Montana.—*Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273.

Nevada.—*Taylor v. Nevada-California-Oregon Ry.*, 26 Nev. 415, 69 Pac. 858.

New Jersey.—*Andrecsik v. New Jersey Tube Co.*, 73 (N. J. L.) 664, 63 Atl. 718.

New York.—*Spencer v. Worthington (Sup'r Ct.)*, 44 N. Y. App. Div. 496.

Rhode Island.—*Collins v. Harrison*, 25 R. I. 489, 56 Atl. 678; *Jones v. New American File Co.*, 21 R. I. 125, 42 Atl. 509.

Tennessee.—*East Tenn., etc., R. Co. v. Diffield*, 12 Lea (Tenn.), 63.

Texas.—*Gulf, etc., Ry. Co. v. Donnelly*, 70 Tex. 371, 8 S. W. 52; *Missouri, etc., Ry. Co. v. Baker*, 35 Tex. Civ. App. 542, 81 S. W. 67; *Southern Pac. Co. v. Lasch*, 2 Tex. Civ. App. 68, 21 S. W. 563; *Texas, etc., R. Co. v. Bingle*, 91 Tex. Sup. Ct. 287, 42 S. W. 971.

Virginia.—*Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

Washington.—*Crooker v. Pacific L. & M. Co.*, 29 Wash. 30, 69 Pac. 359, 34 Wash. 191, 75 Pac. 632.

Wisconsin.—*Albrecht v. Chicago & N. W. R. Co.*, 108 Wis. 530, 84 N. W. 882; *Coolidge v. Hallanner*, 126 Wis. 244, 105 N. W. 568; *Curran v. Stange Co.*, 98 Wis. 598, 74 N. W. 377; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337.

2. Other Statements, and Illustrations, of Rule.

If the promise to repair the defect is not performed within a reasonable time for its fulfillment, and the servant continues to incur the danger after the lapse of such reasonable time, he assumes the

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risk of injuries occurring thereafter. So held in *Dowd v. Erie R. Co.* (N. J.), 12 R. R. R. 368, 35 Am. & Eng. R. Cas., N. S., 368, 57 Atl. 248.

If an employee continues in the employment after his employer's failure for a reasonable time to repair defective machinery as promised, he assumes the risk of injury by reason of the defect. So held in *Stalzer v. Dold Packing Co.*, 84 Mo. App. 566.

Abandonment of Intention to Repair Indicated.—A servant complaining of defects and receiving an assurance that they will be remedied is relieved from the assumption of risk for a reasonable time thereafter for making the repairs, but not after such postponement as to indicate that the purpose to repair has been abandoned. So held in *Hillje v. Hettich*, 95 Tex. 321, 65 S. W. 491.

Defective Snow Plow—Promise Several Weeks Old.—The right to recover against a railroad company for the death of one of its employees, killed in an accident caused by a defective snow plow, is not affected by the fact that some weeks before he had been sent out with the defective plow, and had discovered the defect and notified the company's master mechanic of it, and he had promised to have it repaired. So held in *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 38 L. Ed. 960.

Dangerous Means of Ascending and Descending Mine Shaft.—When a miner, knowing that the means of ascending and descending the shaft in which he is employed is defective and dangerous, continues in the employment after the lapse of a reasonable time for remedying the defect, he assumes the risk from the use of such defective means although he made complaint and was promised that the defect would be promptly remedied. So held in *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007.

F. WHAT CONSTITUTES REASONABLE TIME FOR RELIANCE ON PROMISE.

1. Definite Time Fixed.

Where the employer fixes a definite time within which the repair is to be made, the employee may wait until the expiration of the time named. *Louisville Hotel Co. v. Kaltenbrun* (Ky.), 80 S. W. 1163.

2. Exact Time Not Specified—Illustrations.

Promise at Close of Week to Repair During Fore Part of Next Week—Accident on Wednesday.—In *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979, it is held that a promise made by the master at the close of the week to repair a machine during the fore part of the next week was a promise to repair within a reasonable time, and a servant who had accepted employment upon the machine with knowledge of its defects, but subsequently protested against them, and threatened to quit work unless they were remedied, and who was induced by such promise to continue in his employment, was justified in remaining at his work during such time, and where he was

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injured on the Wednesday of the following week, the risk from such defect, which had been accepted by him with the employment, became that of the master.

Roof of Railroad Pumping Station Defective—Accident a Week after Promise.—Where plaintiff, employed to operate a railroad pumping station, notified his employer of the defective condition of its roof, and was promised that it should be repaired, and was injured by reason of the collapse of the roof while he was walking thereon, within a week after the promise to repair, the expiration of such time was not so unreasonable as to deprive plaintiff of the right to continue work, relying on defendant's promise to make repairs. So held in *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556, 78 S. W. 172.

Loose Rock in Roof of Mine—Accident after Second, and Two Days after, Original Promise to Furnish Props.—In *Breckenridge Co. v. Hicks*, 94 Ky. 362, 22 S. W. 554, it appeared that a miner called the attention of the "mining boss" to loose rock in the roof of the room where he was at work, and the "boss" promised to send in timbers wherewith to prop the roof. The attention of the "boss" was called to the matter a second time, and he said he had forgotten it. Two days after the original promise by the "boss" to repair, the miner, concluding the props would not be sent in, resolved for that reason to quit work, and as he was leaving the mine a rock fell upon him, crippling him for life. It was held that the master was liable.

Loose and Dull Alligator Shears—First Promise in Evening, and Accident Next Morning, Soon after Second Promise.—In *Republic Iron & Steel Works v. Gregg* (Ky.), 17 S. W. 900, it appeared that a servant who was operating a pair of alligator shears, used for cutting sheet iron, and run by machinery, complained in the evening to the millwright that they were loose and dull, and again the next morning; that each time he received a promise that they would be put in order, but at ten o'clock on that morning he was injured by reason of their condition. It was held that an unreasonable time had not elapsed for the performance of the promise.

Absence of Shield on Indicator Glass of Locomotive Lubricator—Explosion Three Hours after Engine Started on Trip and Five Hours after Promise.—In *Albrecht v. Chicago & N. W. R. Co.*, 108 Wis. 530, 84 N. W. 882, it appeared that as a locomotive was backed out of the roundhouse, the fireman, who had never before made a trip on that particular engine, called the engineer's attention to the absence of the proper metallic shield on the indicator glass of the lubricator; telling him he must get a shield, and the engineer promised to do so. The fireman knew fully the danger of leaving the glass unguarded. The engine did not start on its trip until about two hours later, during which time it was located at some distance from the roundhouse, and the fireman was with it, working about the cab, with every opportunity to observe whether the shield was put in place or not, and when the engine started on its trip he must have known that the

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glass was still unguarded. About three hours later, during the trip, the glass exploded, causing injury to the fireman. It was held that he assumed the risk, as the reasonable time during which, if at all, he might continue in the service upon the faith of the engineer's promise to procure the shield expired when the engine started on its trip.

G. TEST OF REASONABLE TIME FOR RELIANCE ON PROMISE.

1. Sufficiency of Time for Fulfillment.

The time for which a servant is entitled to remain in the service in reliance on his master's promise to remedy a dangerous condition, where no exact time is specified, is such time as would be reasonably sufficient for the fulfillment of the promise. *Detroit Crude-Oil Co. v. Grable* (C. C. A.), 94 Fed. Rep. 75; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *Jones v. New American File Co.*, 21 R. I. 125, 42 Atl. 509; *Illinois Steel Co. v. Mann*, 70 Ill. 200, 48 N. E. 417.

2. Where Failure to Set Time.

Where the employer makes a general promise to repair, without naming a time, it should be construed to mean such time as would be reasonably necessary for the performance of the promise. So held in *Louisville Hotel Co. v. Kaltenbrun* (Ky.), 80 S. W. 1163.

H. HOW LONG SERVANT MAY RELY ON PROMISE IS QUESTION FOR JURY.

And what is such reasonable time is generally a question for the jury.

Idaho.—*Harvey v. Alturas Gold Min. Co.* (Idaho), 31 Pac. 819.

Illinois.—*City of Kinmundy v. Anderson*, 103 Ill. App. 457; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367.

Indiana.—*Daugherty v. Midland Steel Co.*, 23 Ind. App. 78.

Iowa.—*Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662.

Kansas.—*Atchison, etc., R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343.

Minnesota.—*Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357; *Roth- enberger v. Northwestern Consolidated Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Smith v. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358.

Nevada.—*Taylor v. Nevada-California-Oregon Ry.*, 26 Nev. 415, 69 Pac. 858.

New Jersey.—*Andrecsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 718.

Wisconsin.—*Curran v. Stange Co.*, 98 Wis. 598, 74 N. W. 377.

The question whether the injury occurred within a reasonable time after the promise made to repair the defective machinery is a question for the jury, with proper instructions from the court. So held in *Harvey v. Alturas Gold Min. Co.* (Idaho), 31 Pac. 819.

Note

I. AFTER EXPIRATION OF TIME SPECIFIED.

1. General Rule.

Where the master has set a particular time for the fulfillment of his promise, the servant's assumption of risk from the danger complained of is suspended only until the expiration of such time.

Alabama.—*Eureka Co. v. Bass*, 81 Ala. 200, 8 So. 216.

Arkansas.—*King-Rider Lumber Co. v. Cochran*, 71 Ark. 55, 70 S. W. 606.

Illinois.—*Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393.

Kansas.—But see *Atchison, etc., R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343.

New Jersey.—*Andercsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 718.

New York.—*Citrone v. O'Rourke Engineering Const. Co. (Sup. Ct.)*, 99 N. Y. Supp. 241.

Pennsylvania.—*Calhoun v. Holland Laundry*, 208 Pa. St. 139, 57 Atl. 350; *Schliglizzo v. Dunn*, 211 Pa. St. 253, 60 Atl. 724.

Rhode Island.—*Jones v. New American File Co.*, 21 R. I. 125, 42 Atl. 509.

Tennessee.—*Trotter v. Furniture Co.*, 101 Tenn. 257, 47 S. W. 425.

Texas.—*Hillje v. Hettich*, 95 Tex. 321, 65 S. W. 491.

Wisconsin.—*Albrecht v. Chicago & N. W. R. Co.*, 108 Wis. 530, 84 N. W. 882.

If the master's promise is to remedy defects by a fixed time the promise does not suspend the servant's assumption of risk beyond that time. So held in *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393.

When the agreement to repair is not indefinite, but specific, as to the time of its performance, if the promise is not performed within the time specified for its fulfillment, and the servant continues in the employment after a manifest breach of the master's promise to repair, the assumption of risk by the master ceases, and the servant resumes the risk of subsequent injuries therefrom. So held in *Andercsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 718.

Promise to Repair at Noon Hour and Accident at Three O'Clock.—In *Andreicsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 718, it appeared that plaintiff complained to his master's superintendent at 10 o'clock in the forenoon that the machine upon which he was working was out of order. The defect was obvious. The superintendent said: "you go right ahead with the work. We are overloaded with work, at noon hour I will fix this for you." The repair was not made at the noon hour. Nevertheless, plaintiff resumed work upon the obviously defective machine, and at three o'clock was injured by reason of such defect. It was held that the promise to repair was definite and specific as to the time of performance, and that plaintiff was properly nonsuited.

Sauter v. Atchison, etc., Ry. Co**2. Duty to Quit Service as Question for Jury.**

But in *Atchison, etc., R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343, it is held that where a tool or appliance furnished by an employer is defective, and he promises to replace it with a suitable one, the rule that the employer is entitled to a reasonable time thereafter to make the substitution does not make it incumbent on the employee either to quit the service or assume the risk attending the use of the defective article immediately on the expiration of the time when the employer ought to have fulfilled his promise. In doubtful cases it is for the jury to determine what is a reasonable time within which each party ought to act.

J. REVOCATION OF PROMISE—DUTY TO DISCONTINUE WORK.

In *Neely v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356, 75 Pac. 302, it is held that where after giving a promise to repair a dangerous defect and prior to the accident to the employee to whom it was made, the employer directly or indirectly revokes his former promise to repair or remedy, the employee will not be warranted in further continuing his service by such promise to repair.

A. R. Y.

SAUTER v. ATCHISON, T. & S. F. Ry. Co.

(Supreme Court of Kansas, June 6, 1908. Rehearing Denied Oct. 2, 1908.)

[97 Pac. Rep. 434.]

Carriers—Freight Shipment—Contract.—A mere statement of the station agent of a railroad company, to one about to deliver goods to the company for shipment over its railroad, that the goods should arrive at the proposed destination at a certain time, does not constitute a contract to carry them within such time.

Same—Nondelivery—Act of God.*—An agreement by a railroad company with a shipper to transport his goods from one station to another on its railroad within a certain time does not make the carrier an absolute insurer of the goods, but their destruction within the prescribed time by an act of God will excuse nondelivery thereof.

(Syllabus by the Court.)

*See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176; second foot-note appended to *Louisville & N. Ry. Co. v. Warfield & Lee* (Ga.), 27 R. R. R. 345, 50 Am. & Eng. R. Cas., N. S., 345; *Illinois Cent. R. Co. v. Davis & Levy* (Miss.), 27 R. R. R. 109, 50 Am. & Eng. R. Cas., N. S., 109; *Alabama Great So. R. Co. v. Elliott & Sons* (Ala.), 25 R. R. R. 656, 48 Am. & Eng. R. Cas., N. S., 656; *Southern Ry. Co. v. Smith* (Ky.), 25 R. R. R. 652, 48 Am. & Eng. R. Cas., N. S., 652.

Sauter v. Atchison, etc., Ry. Co

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Henry Sauter against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

The plaintiff in error brought this action in the district court of Sedgwick county to recover damages for the loss of a horse and household and other goods which were shipped on the 28th day of May, 1903, over the defendant's line of railroad at Galesburg, Ill., to be delivered at Wichita, Kan., on the same line. According to the undisputed evidence in the case the car arrived at Argentine, Kan., which is adjacent to Kansas City, Mo., on the 30th day of May, 1903, and during what is known as "the great flood." The last train departing over said railroad west from Argentine, prior to about June 7, 1903, was about 11 a. m. May 29, 1903. The car was moved to the higher points in the yards, where it remained during the flood and was submerged in water about 11 or 12 feet deep. A horse, which was shipped in the car, died, and the household goods were ruined. On the trial of the case it was agreed that the plaintiff was entitled to recover \$1,200 and costs, if he was entitled to recover anything. A jury was impaneled in the district court to try the case, and after the evidence of the parties was introduced the court, on the motion of the defendant, instructed the jury to return a verdict for the defendant, which was done, and judgment was rendered against the plaintiff for costs.

Geo. W. Freerks and *M. C. Freerks*, for plaintiff in error.

Wm. R. Smith, *O. J. Wood*, and *A. A. Scott*, for defendant in error.

SMITH, J. (after stating the facts as above). It is conceded by the plaintiff that if, as appears to be the case, the loss occurred through "an act of God," the defendant would not be responsible in damages therefor under the ordinary contract of freight shipment. He alleges in his petition, and relies upon, an oral contract between himself and the station agent of the defendant at Galesburg, Ill., by the terms of which "said car, so to be loaded and so to be transported, was to go right through without stops, and that it should reach Wichita, Kan., not later than the morning of the 31st day of May, 1903." In consideration of said contract the plaintiff agreed to pay, and did thereafter pay, the defendant the sum of \$60 for the service. The only evidence in support of the alleged special contract is the statement of the plaintiff as a witness. His undisputed testimony is as follows: "I went to see the C., B. & Q. agent, and on the 28th day of May, 1903. I returned to Mr. Machen, the agent for the Santa Fé. I asked him the same as I did before, and I asked him whether they would ship the goods right through, and when it would arrive at Wichita.

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He said it should arrive at Wichita the following Sunday, May 31, 1903. I told him what I wanted to put in the car—that I wanted to put a horse in, and also asked whether a man could go in the car to take care of the horse. He said they would give free transportation with the car for \$60. Pursuant to this talk I took the car and loaded the stuff in it." The plaintiff also testified that, after the goods and the horse were loaded in the car, he signed a contract of shipment and a bill of lading.

The usual rule is that where parties orally negotiate and agree to a contract and the terms thereof, and thereafter reduce their contract to writing, the writing supersedes the spoken words, and is presumed to include all of the contract. The oral agreement merges into the written one. Whether this rule should apply under the circumstances of this case it is not necessary here to decide, as we do not think the evidence is sufficient to sustain the allegations of the petition in regard to the making of the oral contract. Strict as are the rules of the common law in imposing upon the carrier liability for goods lost in transportation, "an act of God" is, thereunder, a justification for failure to perform the contract of carriage, and relieves the carrier from liability for a loss of the goods consigned. *Rodgers v. Railway Co.*, 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 685; 6 Cyc. 377. It is said in 1 Am. & Eng. Encyc. Law, 592: "A common carrier, liable as an insurer for the property intrusted to him for the purpose of transportation, is nevertheless excused from responsibility for losses which are caused by an act of God." If a contract may be made for the delivery of goods so strong as to render this excuse unavailable to the carrier for loss thereof in transportation, it must be expressed in language clearly and unequivocally disclosing such intent. The unusual character of such an agreement would call to its aid no presumption from the usual course of business.

Such a contract is not deducible from the conversation related by plaintiff as occurring between himself and the station agent at Galesburg on May 28, 1903. The answer of the agent as to when the goods would arrive at Wichita is more suggestive of an intention to inform the plaintiff of the time when the train would be there due, by the time-table, than of an intention to warrant its arrival by the time indicated. If, however, it be construed as a contract to deliver the goods within the time specified, which is all that is claimed in the petition, responsibility for failure to perform the contract is excused if prevented by the act of God. *Strohn et al. v. Detroit & Milwaukee R. R. Co.*, 23 Wis. 126, 99 Am. Dec. 114. That case is very similar to this, and after holding that the statement of a station agent to the shipper as to the time a shipment should arrive at its destination does not constitute a contract that the transportation will be consummated within that time, the court says: "We do not understand, however, that

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when a railroad company by its agent agrees to deliver goods within a prescribed time it becomes an absolute insurer of the goods, and must deliver at all events or pay for the property. We suppose, if the goods were destroyed by an act of God or the public enemy before the time for delivering them expired, this would excuse the carrier on the special contract. The parties are presumed to contract with reference to the responsibility which the common law imposes upon the carrier in ordinary cases; the carrier assuming the risk in respect to the time. Such, it seems to us, is the extent of liability assumed by the special agreement."

We conclude that the conversation, testified to as evidence of a parol contract to transport the goods to their destination within a prescribed time, is not sufficient to clearly indicate such an agreement; also that if such a contract were established the carrier does not thereby become the absolute insurer of the goods, and bound to pay the value thereof, when they are destroyed and the delivery prevented by the act of God before the expiration of the agreed time of delivery. The evidence indicates that the flood, the act of God, was the sole cause of the loss of the goods and the horse.

The judgment is affirmed.

FRENCH v. MERCHANTS' & MINERS' TRANSP. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, June 19, 1908.)

[85 N. E. Rep. 424.]

Carriers—Carriage of Passengers—Limitation of Liability—Notice to Passenger.*—As a general rule, a passenger who accepts a ticket on which the contract of transportation is stated is bound by its terms, whether he reads it or not.

Same.*—Where a passenger's ticket contained on its face nearly two quarto pages of printed provisions, the holder of the ticket was bound to have read it to her, if she could not read it herself, and the fact that her eyesight was defective and that she claimed that she could see only "large objects" was insufficient to excuse her from acquainting herself with the contents of the ticket.

*For the authorities in this series on the question whether mere acceptance of a passenger ticket includes assent to its printed or written conditions, see first foot-note appended to *McCollum v. Southern Pac. Co.* (Utah), 26 R. R. R. 265, 49 Am. & Eng. R. Cas., N. S., 265; third foot-note appended to *Boling v. St. Louis & S. F. R. Co.* (Mo.), 22 R. R. R. 456, 45 Am. & Eng. R. Cas., N. S., 456.

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Same—Invalidity of Ticket.†—The limitation of liability for loss of baggage contained in a passenger's ticket is not invalid, because the limitation is general in its terms, without reference to negligence; but such limitation will be enforced as to all losses not resulting from the negligence of the carrier.

Same—Proximate Cause.‡—Negligent delay in transporting the baggage of a passenger not being the proximate cause of a loss of the baggage by fire while the baggage was held at an intermediate point, a general limitation of liability for loss of baggage contained in the passenger's ticket operated to relieve the carrier from liability.

Exceptions from Superior Court, Suffolk County; William Cushing Wait, Judge.

Action by Harriet E. French against the Merchants' & Miners' Transportation Company. From a judgment for defendant, plaintiff brings exceptions. Exceptions overruled.

Thomas R. Bateman and *Harold W. Brown*, for plaintiff.

A. Nathan Williams and *George F. Manson*, for defendant.

LORING, J. It is stated in the bill of exceptions that the plaintiff did not "contend that this fire was due to any negligence whatsoever on the part of the defendant, nor that the defendant was lacking in diligence in trying to control and extinguish said fire." This ended the plaintiff's case unless it was taken out of the usual rule by the fact that the jury were warranted in finding from the testimony of the plaintiff that she "could see large objects, but could not read print and had not been able to read for over a year previous to this trip."

We do not think that the plaintiff's case would have been taken out of the usual rule if the jury had believed the plaintiff and found that her eyesight was what she testified it to be.

The usual rule is that a passenger who accepts a ticket on which the contract of transportation is stated is bound by its terms whether he reads it or not. *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Quimby v. Boston & Maine Railroad*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *Cox v. Central Vermont Railroad*, 170 Mass. 129, 49 N. E. 97; *Graves v. Adams Express Co.*, 176 Mass. 280, 57 N. E. 462; *Hood Co. v. American Pneumatic Service Co.*, 191 Mass. 27, 77 N. E. 638.

†For the authorities in this series on the question of the power of a railroad to limit its liability with respect to its passengers' baggage, see *Rose v. Northern Pac. Ry. Co.* (Mont.), 23 R. R. R. 557, 46 Am. & Eng. R. Cas., N. S., 557; foot-note appended to *Jacobs v. Central R. Co.* (Pa.), 11 R. R. R. 562, 34 Am. & Eng. R. Cas., N. S., 562, where all those preceding it are collected.

‡See foot-notes appended to *Siemonsma v. Chicago, etc., Ry. Co.* (Iowa), 28 R. R. R. 140, 51 Am. & Eng. R. Cas., N. S., 140.

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The ticket here in question must be taken on this bill of exceptions to contain on its face nearly two quarto pages of printed provisions. It must have been apparent, even to a person who can see only "large objects," that the ticket contained a contract, and the plaintiff was bound to have it read to her if she could not read it herself.

By the terms of the contract between the plaintiff and the defendant, the defendant is not to be liable for injury to baggage arising from fire. The legal result of such a contract is that it is not liable for fire unless negligent. *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *School District v. Boston, Hartford & Erie Railroad*, 102 Mass. 553, 3 Am. Rep. 502; *Pemberton Co. v. New York Central Railroad*, 104 Mass. 144, 151; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 305, 15 Am. Rep. 106. What was said by this court in *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 557, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660, and in *Cox v. Central Vermont Railroad*, 170 Mass. 129, 137, 49 N. E. 97, means that such a contract is invalid, if it is construed to be a contract exempting the carrier when he is negligent. It was not meant that, where the contract exempts the carrier generally without reference in terms to the subject of negligence, it is invalid altogether. Such a contract is construed to be a contract exempting the carrier unless the passenger proves that he was negligent.

The plaintiff therefore is thrown back on her contention that the jury were warranted in finding that the defendant agreed to carry her trunk from Savannah to Boston and was negligent in holding her trunk in Baltimore from June 4th until June 13th, when it was destroyed by fire. For the natural and probable consequences of that delay the defendant would be liable if such a finding was warranted on the evidence. But the destruction of the trunk by fire was not the natural and probable consequence of not forwarding it promptly, and since the only liability of the defendant is for delay it is not liable for its loss. *Denny v. New York Central R. R.*, 13 Gray, 481, 74 Am. Dec. 645; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106. See, also, in this connection, *Whitcomb v. Bacon*, 170 Mass. 479, 482, 49 N. E. 742, 64 Am. St. Rep. 317; *Hurley v. Packard*, 182 Mass. 216, 65 N. E. 64.

Exceptions overruled.

ROANOKE RY. & ELECTRIC CO. v. STERRETT.

(Supreme Court of Appeals of Virginia, Sept. 10, 1908.)

[62 S. E. Rep. 385.]

Carriers—Accident to Train—Collapse of Bridge—Hidden Defect—Evidence.—Evidence held to sustain the theory that the collapse of a street railway company's bridge was caused by a hidden and internal defect in the weld of a cord which supported the entire structure, and which broke at the place where welded, which defect could not have been detected by the utmost scrutiny.

Same — Carriage of Passengers — Personal Injuries — Hidden Defects.*—Where an accident arises from a hidden and internal defect, which a thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, the carrier is not liable for an injury to a passenger resulting therefrom.

Negligence—Acts Constituting Negligence—"Inevitable Accident."—An accident is inevitable if the person in connection with whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another; and in such a case, the essential element of legal duty being wanting, the person cannot be held negligent.

Carriers—Carriage of Passengers—Personal Injuries—Negligence.*—The slightest neglect against which human prudence and foresight might have guarded, and by reason of which an injury may have been occasioned, renders a carrier liable for an injury to a passenger.

Same—Trial—Instructions.†—In an action by a passenger against a carrier for injuries resulting from the collapse of a bridge, a requested charge that plaintiff, to establish defendant's negligence, must show more than a probability of a negligent act, and cannot recover if it is just as probable that the accident resulted from one of two causes, for one of which defendant was not responsible, was properly modi-

*See first foot-note appended to *St. Louis, etc., Ry. Co. v. Green* (Ark.), 27 R. R. R. 671, 50 Am. & Eng. R. Cas., N. S., 671; fifth foot-note appended to *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; last foot-note appended to *Valente v. Sierra Ry. Co.* (Cal.), 26 R. R. R. 676, 49 Am. & Eng. R. Cas., N. S., 676; foot-note appended to *Magee v. New York, etc., R. Co.* (Mass.), 26 R. R. R. 221, 49 Am. & Eng. R. Cas., N. S., 221.

†See second foot-note appended to *O'Gara v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 333, 50 Am. & Eng. R. Cas., N. S., 333; foot-note appended to *Cincinnati Traction Co. v. Holzenkamp* (Ohio), 25 R. R. R. 553, 48 Am. & Eng. R. Cas., N. S., 553; last foot-note appended to *Connell v. Seattle, etc., Ry. Co.* (Wash.), 27 R. R. R. 701, 50 Am. & Eng. R. Cas., N. S., 701; foot-note appended to *Pennsylvania R. Co. v. McCaffrey* (C. C. A.), 23 R. R. R. 23, 46 Am. & Eng. R. Cas., N. S., 23.

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fied to state that plaintiff, to establish defendant's negligence, must show more than a probability of a negligent act, but that, when plaintiff had shown that she was injured by the breaking down of the bridge and overturning of the car, it was sufficient proof of defendant's negligence, and that the burden of proof was then on defendant to establish by a preponderance of evidence that it has been guilty of no negligence whatsoever which caused the accident, and that the damage has been caused by inevitable casualty or by some cause which human care and foresight could not prevent.

Same—Presumption of Carrier's Negligence.†—The presumption of a carrier's negligence does not arise from the abstract fact of an accident to a passenger, but whether it exists depends upon the nature of the accident, which must be such as does not in the usual course of things happen to passengers when due care is exercised by the carrier.

Error to Circuit Court, Roanoke County.

Action by Mary E. Sterrett against the Roanoke Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for a new trial.

Robertson, Hall, Woods & Jackson and *Dupez & Whittle*, for plaintiff in error.

N. H. Hairston & Son, and *Hoge & Penn*, for defendant in error.

HARRISON, J. This action was brought by Mary E. Sterrett against the Roanoke Railway & Electric Company to recover damages for injuries alleged to have been sustained by her in consequence of the negligent failure of the defendant company to maintain one of its street railway bridges in a safe condition. The trial resulted in a verdict and judgment in favor of the plaintiff, the propriety of which is called in question by this writ of error.

In the view we take of the case, it will conduce to clearness and brevity to consider first the assignment of error, which involves the action of the circuit court in refusing to set aside the verdict of the jury, upon the ground that it was contrary to the law and the evidence.

The record shows that one branch of the defendant's street car system ran from Roanoke City for a distance of some 2½ miles to the suburban town of Vinton. Before reaching the corporate limits of Vinton, this line crossed Tinker creek on an iron truss bridge, which was about 75 feet long, made into one span composed of six sections of 12½ feet each. Upon each section of

†See foot-note on preceding page.

For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a passenger is injured, see last foot-note appended to *Pittsburg, etc., Ry. Co. v. Higgs (Ind.)*, 24 R. R. R. 201, 47 Am. & Eng. R. Cas., N. S., 201, where all those preceding it are collected.

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the span was placed wooden stringers, running the length of each section. These stringers were 12 by 10 inches in size, and were supported at either end of the 12½-foot section by resting about 2 or 2½ inches on metal plates, called "floor beams," about 5 inches in width. These wooden stringers were fastened together with straps, so as to hold them together and prevent lateral movement. Upon these stringers were placed the cross-ties, which were securely fastened, and to the ties were spiked the rails. The record further shows that this bridge is what is known as a "pin connected Pratt truss bridge"; that the truss is supported by long iron cords, known as top and bottom cords, made of wrought iron. These cords come together at a point just under the track, and are connected by a pin or post, made of wrought iron, which pin runs through loops at the ends of these cords. It is shown that the entire weight of the bridge is held up by these cords, and the bridge so constructed that if the connecting pin is broken, or any one of the cords is broken, the bridge will collapse. It appears that the iron bridge in question was made to order for the defendant company by the Virginia Bridge & Iron Company, of Roanoke, Va., which is shown to have been, and still to be, a thoroughly reputable, competent, and reliable manufacturer. It further appears that at the time of the accident the bridge had been continuously in use for six years, and was believed by the defendant railway company to be perfectly safe and suitable for the use to which it was put. It further appears that some eight or ten months prior to the accident this bridge was thoroughly overhauled, new stringers were put in, and the entire structure examined and inspected. It is also shown that about two months prior to the accident new 60-pound rails were submitted for old rails, and the entire bridge at that time again examined and inspected. It further appears that a competent inspector of bridges was kept in the employ of the defendant company, who examined this bridge every few weeks, and that no defect was discovered, except those which were repaired in the manner already mentioned. The capacity of the bridge is shown to have been very much greater than was actually necessary for the purposes and uses to which the bridge was put.

On the morning of the accident several cars, heavily loaded with passengers, had passed over the bridge safely, with nothing occurring to suggest or indicate any defect therein. Finally the car involved in the accident under consideration, containing about 85 or 90 passengers, came upon the bridge on its way from Vinton to Roanoke. It had passed over about three-fourths of the bridge, when suddenly and without warning the structure collapsed, and the bridge, with the exception of a portion of its western section, fell into the stream. The car, with its passengers, was for a while held up by the rails, but these rails gradually bent until one of them broke, precipitating the rear end of the

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car into the stream. Mary E. Sterrett, the defendant in error, was a passenger on this car, and received the injuries of which she complains.

Totally different theories are advanced by the parties, respectively, as to the cause of this accident. The defendant in error contends that some of the stringers, the ends of which rested upon the floor beams, had slipped until the lap or catch was reduced from 2 or 2½ inches to only one inch and a half, and that the defendant company had, or ought to have had, notice of this alleged defect. The contention of the defendant in error is, further, that the weight of the car upon these stringers caused them, at the time of the accident, to slip entirely off of the floor beams, thus leaving nothing to support the car.

The contention of the plaintiff in error is that one of the iron cords which was found broken had a defective weld just where the loop was made in the cord, and that the break was in this weld; that the defect in the weld was latent, and could not be discovered by any external examination, and only appeared after the weld was broken; and that the hidden defect in the weld caused the cord to break and the bridge, which was supported by the cord, to collapse.

We are of opinion that the evidence fails to sustain the contention of the defendant in error that the accident was caused by the stringers slipping off of the floor beams, and establishes the theory of the plaintiff in error, that the accident resulted from the defective weld which caused the cord supporting the entire structure to break, thereby effecting the inevitable collapse which followed.

The witnesses introduced by the defendant in error for the purpose of showing that the bridge was not in a safe condition were without knowledge or experience in the construction of bridges or in bridge engineering. They do not profess to know that the stringers were in an unsafe condition, or whether they had been built into the bridge as situated when seen by them. They do not say that the slipping of the stringers, which they supposed had taken place, caused or contributed to the accident. They merely state, without having made any measurement, that the stringers only rested upon the floor beams 1½ inches; the statement that they had slipped being mere assumption. Further, these witnesses made their observations of the stringers in most instances some time before the accident, and locate most, if not all, of the stringers observed by them at a point other than the section of the bridge where the collapse occurred. This theory of the defendant in error, that the stringers had slipped and thereby caused the accident, is, however, shown to be fallacious and without foundation by the testimony of competent experts, whose evidence is not in conflict with the plaintiff's witnesses, who admit their inability to say whether the conditions they describe did, or did not, cause or contribute to the collapse of the bridge.

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Two experts were introduced by the plaintiff in error—one a bridge builder and the other a bridge engineer—both competent, with long experience in their line and familiar with the character and construction of the bridge in question. They show that the conditions described by the plaintiff's witnesses, if true, could not have caused the accident, and did not in any way contribute thereto. The undisputed testimony of these experts is that, if the stringers had slipped and fallen, it would not have caused the bridge to fall, for the reason that the stringers get their support, in part, from the bridge, while the latter gets no part of its support from the stringers.

These experts explain the mechanism of the bridge, and show that, while it is built in 6 sections of 12½ feet each, yet these sections are all connected into one entire span which makes the whole bridge. The iron cords which unite these several sections and bind them into one span are what holds up the bridge; the stringers performing no function of that sort. If one of these cords breaks, the bridge falls. It is further shown that, if one or more of the stringers had slipped from the beams and fallen into the creek, neither the bridge nor the car would have fallen from that cause.

These experts inspected the bridge after it had fallen, and found no unsound or broken timbers therein, and found no faulty condition of anything about the bridge, except the defect in the loop of the bottom cord, where there had been an imperfect weld. The broken cord was produced in court, and the unqualified testimony of these experienced bridgemen is that the breaking of that cord was the sole cause of the accident, and that the defect in the cord was the imperfect weld, which could not have been detected by the utmost scrutiny.

"Where an accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary compensation." 2 Hutchinson on Carriers (3d Ed.) §§ 903, 904. The liability of a carrier of passengers as thus defined is now almost universally adopted.

As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it; and, if the accident complained of was inevitable, it is not a case of negligence. An accident is inevitable, if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent its injuring another. In such a case the essential element of a legal duty is wanting, and it cannot, there-

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fore, be a case of negligence. 1 Shearman & Red. on Neg. §§ 15, 16.

Applying these well-settled principles to the established facts in the case before us, the conclusion cannot be escaped that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against, and that no liability attaches to the plaintiff in error on account thereof.

Notwithstanding the conclusion reached on the merits, the case must under our practice, be remanded for another trial, if the plaintiff be so advised. It is therefore necessary that objections taken to two of the instructions given by the circuit court should be considered.

The first of these is instruction No. 4, given on behalf of the plaintiff, which is as follows: "The slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been occasioned, renders the Roanoke Railway Company liable in damages for such injury."

The objection made to this instruction is that the jury are told that negligence that may have occasioned the plaintiff's injury will justify a recovery; it being insisted that the negligence must have caused the injury in order to justify a recovery.

This instruction, in the same language that is here employed, has been more than once approved by this court in cases of a like nature. *Balt. & O. R. Co. v. Wightman's Adm'r*, 29 Gr. 431, 26 Am. Rep. 384; *Balt. & O. R. Co. v. Noel's Adm'r*, 32 Gr. 394. In both of these cases the accident resulted to a passenger from the falling of a railroad bridge. An examination of the records and the briefs filed in both cases shows that the same objection and the same argument in support thereof was there made to this instruction that is now made.

In the first case cited Judge Staples, speaking for a unanimous court, in referring to this instruction in common with four others, says: "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country."

The case of *Noel's Adm'r*, *supra*, is to the same effect.

In the light of these authorities, the objection to the instruction under consideration was properly overruled.

The second objection taken by the plaintiff in error is to the modification made by the circuit court of its instruction No. 2. The instruction as asked for, was as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds. They are further instructed that the evidence must show more than a probability

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of a negligent act, and the plaintiff cannot recover if it is just as probable that the accident in which the plaintiff was injured resulted from one of two causes, for one of which the defendant is not responsible."

This instruction was modified by the court, and made to read as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds, and the evidence must show more than a probability of a negligent act; but, when the plaintiff has shown that she was injured by the breaking down of the bridge and overturning the car, then this is sufficient proof of negligence on the part of the defendant company to meet the requirements above stated, and then the burden of proof is on the company to establish, by a preponderance of evidence, that it has been guilty of no negligence whatsoever which caused the accident, and the damage has been occasioned by inevitable casualty or by some cause which human care and foresight could not prevent."

There was no error in this action of the circuit court. Under the instruction, as asked for, the defendant company would merely have to raise a doubt as to the cause of the accident, and thereby shift to the plaintiff a greater burden than the law imposes in such cases. In the case of a passenger, when the plaintiff shows that his injury resulted from an accident which was caused by the breaking down of one of the carrier's bridges, it is sufficient proof of negligence on the part of the defendant company to put the burden upon it of establishing, by a preponderance of evidence, that the accident and the resulting damage was occasioned by inevitable casualty, or by some cause which human care and foresight could not have prevented. The presumption of negligence suggested does not arise from the abstract fact of an accident to a passenger, but arises from a consideration of the nature and quality of the accident; and it must appear that it was such an accident as does not, in the usual course of things, happen to passengers when due care is exercised on the part of the carrier. 3 Thompson on Neg. § 3484; Richmond Ry. & Elec. Co. v. Hudgins, 100 Va. 409, 41 S. E. 736.

Because of the error of the circuit court in not setting aside the verdict as contrary to the law and the evidence, its judgment must be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

MCGANN v. BOSTON ELEVATED RY. CO

(Supreme Judicial Court of Massachusetts, Suffolk, Sept. 4, 1908.)

[85 N. E. Rep. 570.]

Carriers—Injury to Passenger — Action — Evidence — Prima Facie Case.*—In an action by a street car passenger for injuries by being thrown from a platform, plaintiff does not make out a prima facie case merely by proof that the car gave a jerk or similar motion, and that he was hurt; but must further show that it was due to a defect in the track or to negligence in operating the car.

Same—Management of Conveyance.—The motorman of an electric street car is not bound to maintain a uniform speed, even though the car is between 250 and 300 feet from a stopping place for which a signal has been given.

Exceptions from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Action by Murtagh McGann against the Boston Elevated Railway Company. Judgment for plaintiff, and defendant prosecutes exceptions. Exceptions sustained.

Vahey, Innes & Vahey, for plaintiff.

Robert G. Dodge and *Sandford H. E. Freund*, for defendant.

LORING, J. This action is brought by a passenger to recover for injuries suffered by him when he was thrown or fell from a car of the defendant at about 8 o'clock in the evening of October 24, 1903.

The car in question was a closed car operated by electricity. The plaintiff got on at Watertown Square, intending to get off at Cottage street in East Watertown.

The car in question was running east on Mt. Auburn street. The white post for the stopping place next before Cottage street is at School Lane. Cottage street is 630 feet further on than School Lane. The plaintiff was thrown off at a point 245 feet west of Cottage street, that is to say, as the car in question was going it had to go 245 feet beyond the place where the plaintiff was thrown off in order to arrive at Cottage street.

The plaintiff's story was that at or about School Lane he signaled the conductor to stop at Cottage street. The conductor "bowed his head, and then the car after it went a good ways, slowed up, and I thought it was at Cottage street, and I got up, and as soon as I got out on the platform it made a sudden jump and threw me right on my head and I didn't know anything more." In another part of his testimony the plaintiff's description of what happened was that "the car gave a jerk." It is admitted that the

*See second foot-note appended to preceding case.

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car did not come to a stop; the plaintiff's testimony as to that was "it was almost at a full stop." The defendant's tracks from School Lane to Cottage street are straight and the street was well lighted.

In addition to his own testimony the plaintiff introduced that of one Neal, who was walking on the right-hand sidewalk of Mt. Auburn street, in the direction in which the car was going and just ahead of it. He also put on the stand one Burke, a policeman, who was standing opposite Cottage street, on the other side of Mt. Auburn street.

Neal testified that the car was "coming apparently slowly, and I looked around. It started forward, and a body came out onto the street." On being asked to state what kind of movement the start was, he testified: "Well, it was a start, going from slowing down to a speed—to a—to quite a speed."

Burke testified: "I saw the car slow down, I saw it start ahead quickly. It started with a sudden jerk or jump. It started as though—when I have ridden on cars—the motorman would let off the brake and it would start and go ahead."

The plaintiff, in going on the platform to get off when the car reached Cottage street, took the risk of all accidents not arising from negligence on the part of the defendant. *Stewart v. Boston & Providence R. R.*, 146 Mass. 605, 606, 16 N. E. 466; *Wienschenk v. New York, New Haven & Hartford R. R.*, 190 Mass. 250, 251, 76 N. E. 662.

We are of opinion that the evidence of the plaintiff did not warrant a finding that the defendant was negligent. A plaintiff does not make out a cause by proving that an electric car gave a jerk or similar motion and that he was hurt. *Byron v. Lynn & Boston R. R.*, 177 Mass. 303, 58 N. E. 1015; *Timms v. Old Colony Street Ry.*, 183 Mass. 193, 66 N. E. 797; *Jameson v. Boston Elevated Ry.*, 193 Mass. 560, 79 N. E. 750; *Sanderson v. Boston Elevated Ry.*, 194 Mass. 337, 80 N. E. 515. See, also, in this connection *Stewart v. Boston & Providence R. R.*, 146 Mass. 605, 16 N. E. 466; *Snowden v. Boston & Maine R. R.*, 151 Mass. 220, 222, 24 N. E. 40; *Holland v. West End Street Railway*, 155 Mass. 387, 388, 29 N. E. 622; *McCauley v. Springfield Street Railway*, 169 Mass. 301, 302, 47 N. E. 1006; *Foley v. Boston & Maine R. R.*, 193 Mass. 332, 334, 335, 79 N. E. 765, 7 L. R. A. (N. S.) 1076.

The possibility of an electric car giving a jerk is an incident of travel which every passenger must expect. To make out a case of negligence on the part of a defendant railway company in such a case the plaintiff must go further and introduce evidence that the jerk in question was due to a defect in the track or to negligence in the operation of the car. See *Byron v. Lynn & Boston R. R.*, 177 Mass. 303, 305, 58 N. E. 1015; *Timms v. Old Colony Street Ry.*, 183 Mass. 193, 194, 66 N. E. 797. See,

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also, in this connection *Weinschenk v. N. Y., N. H. & H. R. R.*, 190 Mass. 250, 252, 76 N. E. 662; *Foley v. Boston & Maine R. R.*, 193 Mass. 332, 335, 79 N. E. 765, 7 L. R. A. (N. S.) 1076.

The description of the jerk given by the witnesses in the case at bar, so far as the character of it is concerned, is well within the previous cases in which it was held that the plaintiff had not made out a case. *Byron v. Lynn & Boston R. R.*, 177 Mass. 303, 58 N. E. 1015; *McCauley v. Springfield Street Ry.*, 169 Mass. 301, 47 N. E. 1006; *Timms v. Old Colony St. Ry.*, 183 Mass. 193, 66 N. E. 797; *Jameson v. Boston Elevated Ry.*, 193 Mass. 560, 79 N. E. 750. For similar cases of steam railroads see *Stewart v. Boston & Providence, R. R.*, 146 Mass. 605, 16 N. E. 466; *Snowden v. Boston & Maine R. R.*, 151 Mass. 220, 24 N. E. 40; *Weinschenk v. New York, New Haven & Hartford R. R.*, 190 Mass. 250, 176 N. E. 662; *Foley v. Boston & Maine R. R.*, 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076.

To take the case out of those decisions the plaintiff's counsel rely on the fact that it appeared affirmatively in the case at bar that there was no occasion to slow up and start ahead. If the defendant had rested on the plaintiff's evidence the case would have stood in this respect on all fours with the previous decisions of this court. In those cases, as was said by Lathrop, J., of the case then before the court: "As to the apparent sudden stopping, there is nothing to show that it was not caused by some obstacle suddenly appearing in front, such as a horse and wagon or a person on foot, attempting to cross the track a short distance ahead." *Timms v. Old Colony Street Ry.*, 183 Mass. 193, 194, 66 N. E. 797.

It is not necessary to consider whether it was open to the defendant to argue that this may have been the fact in the case at bar although the case made out by it in evidence was that the speed of the car never changed. For we are of opinion that, even if that was not open to the defendant here it is not incumbent on the motorman of an electric car to maintain a uniform rate of speed, even if the car is somewhere between 250 and 300 feet of a stopping place at which he has been signaled to stop.

We have been referred by the plaintiff to a number of cases outside Massachusetts. The case of *Consolidated Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132, is not in accord with the decisions in this commonwealth. As we have said in this commonwealth a plaintiff does not make out a *prima facie* case by introducing evidence that there was a jerk and that he was injured. It seems to be held in *Consolidated Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132, that from those two facts the jury can infer that the jerk was so harsh that it hurt the plaintiff and that in such a case the doctrine of *res ipsa loquitur* applies. The doctrine of our decisions is that the burden is on the plaintiff to introduce evidence to prove that the jerk in ques-

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tion was such a jerk that it would injure a passenger who is in the exercise of due care. The only question before the court in the subsequent case of *Scott v. Bergen County Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060, S. C. 64 N. J. Law, 362, 48 Atl. 1118, was the contributory negligence of the plaintiff.

We find nothing in the other decisions of courts of final resort cited by the plaintiff in conflict with our cases.

Exceptions sustained.

MILLS v. SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington, July 11, 1908.)

[96 Pac. Rep. 520.]

Carriers—Railroads—Operation of Cars—Transportation of Passengers—Performance of Contract by Carrier.—An electric railroad is not required to run all its cars the entire length of its line in the same direction, nor provide for the transfer of passengers from one car to another in the same direction, but may run its cars to such points or stations as will best serve its own convenience and the convenience of the traveling public, and require passengers to take such cars only as will transport them to their destination without change.

Same—Rights of Passengers—Trespassers.—Where a passenger boarded an electric car going in the direction he desired to travel, but not to his destination, owing to his own mistake in taking the wrong car, he was required to leave the car on the conductor's request that he do so at the end of its journey, notwithstanding the conductor's refusal to give him a transfer to another car on which he might complete his journey for the same fare, and, on his refusal to do so, he became a trespasser subject to ejection.

Same—Trespassers—Ejection—Force.*—Where a passenger became a trespasser on an electric car, the carrier's employees were entitled to use only such force as was reasonably necessary to eject him from the car in case he refused to leave of his own accord, and were not entitled to eject him while the car was in motion, so as to endanger life or limb, nor to willfully or unnecessarily assault him.

Same—Questions for Jury.—Where, in an action for the ejection of a passenger from an electric car after he had become a trespasser, there was evidence that more force was used than was necessary, and a willful and unprovoked assault had been committed, the weight of such testimony was for the jury.

*See foot-note appended to *Harris v. Southern Ry. Co.* (Ky.), 8 R. R. R. 753, 31 Am. & Eng. R. Cas., N. S., 753, where all the authorities on the subject in this series preceding it are collected; last foot-note appended to *Louisville & N. R. Co. v. Cottengim* (Ky.), 25 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659; first foot-note appended to *Hayes v. Southern Ry. Co.* (N. Car.), 24 R. R. R. 547, 47 Am. & Eng. R. Cas., N. S., 547.

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Same—Assault by Servant—Scope of Employment.†—Where a car greaser employed by an electric railroad company committed an assault on a passenger who had become a trespasser in endeavoring to eject him from the car, the greaser's act was not within the scope of his employment, so that the carrier was not responsible therefor, unless what was done was to assist the conductor, at his express or implied request.

Appeal from Superior Court, King County; Authur E. Griffin, Judge.

Action by H. J. Mills against the Seattle, Renton & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Sachs & Hale, for appellant.

John E. Ryan, for respondent.

RUDKIN, J. The defendant owns and operates a line of electric railway between the city of Seattle and the town of Renton, in King county. Cars starting out from the city of Seattle run to different points or stations on the line of the road, such as Graham avenue, Ocean Beach, Rainier Beach, and Taylor's Mill. Each car has a notice at the front and rear of the car showing its destination. The five cent fare limit is Graham avenue. Beyond this point tickets to Seattle and return are sold by the conductors on the several cars. Return trip tickets are not sold to each individual station or stopping place, but one general form of ticket is used for all stations to which the rate or fare is the same, and the tickets are good to the farthestmost station from the city of Seattle. Thus passengers purchasing tickets to Seattle and return from Brighton Beach, Ocean Beach, and Rainier Beach will all receive the same form of ticket, and there is nothing on the face of the ticket to mark or indicate the passenger's destination. On the morning of March 25, 1907, the plaintiff in this action took passage on one of the defendant's cars at Rainier Beach, and purchased a ticket to Seattle and return. On the evening of that day he boarded another of the defendant's cars at the city of Seattle for the return trip to Rainier Beach. The notice at the front and rear of the car thus boarded showed that the destination of the car was Ocean Beach, a point about two miles nearer Seattle than Rainier Beach, and such was its destina-

†For the authorities in this series on the question, what acts are, and are not, within the scope of employment of a railroad employee, see second foot-note appended to *Sawyer v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530, where all those preceding it are collected; *Galveston, etc., Ry. Co. v. Currie* (Tex.), 25 R. R. R. 538, 48 Am. & Eng. R. Cas., N. S., 538; *Soderlund v. Chicago, etc., Ry. Co.* (Minn.), 27 R. R. R. 521, 50 Am. & Eng. R. Cas., N. S., 521; *St. Louis S. W. Ry. Co. v. Bryant* (Ark.), 27 R. R. R. 504, 50 Am. & Eng. R. Cas., N. S., 504.

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tion in fact. No questions were asked by the plaintiff as to the destination of the car, and no information was given by him as to his own destination. The conductor took up the tickets, and, when the car reached Ocean Beach, the plaintiff was informed that the car had reached its destination, and was about to return to the barn, and that he, the plaintiff, must leave the car. The plaintiff refused to leave the car, but demanded from the conductor a transfer or other evidence of his right to take another car to his destination at Rainier Beach. This the conductor refused to give, and had no authority to give under the rules of the company. After remaining at Ocean Beach for about five minutes, the car started back towards the barn with the plaintiff still on board. Up to this point there was no conflict in the testimony, and no question of fact for the jury to pass upon. When the car had returned to a point near Brighton Beach, about two miles from Ocean Beach, a conflict arose between the plaintiff and the conductor of the car, or a greaser in the employ of the defendant, or between the plaintiff and both the conductor and the greaser, as a result of which the plaintiff was ejected from the car and assaulted. This action was instituted to recover damages for the wrongful ejection and for the assault, and, from a judgment in favor of the plaintiff, the present appeal is prosecuted.

The following instruction, and others of like import, defining the relative rights and duties of common carriers and their passengers were excepted to, and the giving of these instructions, is assigned as error: "I instruct you, gentlemen of the jury, that if you find from a fair preponderance of the evidence in this case that the plaintiff on or about the 25th day of March, 1907, had in his possession a ticket entitling the plaintiff to ride as a passenger upon one of the defendant's cars from the city of Seattle to Rainier Beach, and that it was printed upon the face of the ticket that the plaintiff was entitled to passage from the city of Seattle to Rainier Beach, and if you further find that he went in the car of defendant in good faith, believing that he was entitled to ride upon the car of defendant upon which he entered as a passenger from the city of Seattle to Rainier Beach, then he became a passenger of defendant from the city of Seattle to Rainier Beach for hire, and was entitled to be transported by defendant as a passenger, and was entitled to all the rights and duties and privileges of a passenger for hire upon that street railway line from the city of Seattle to Rainier Beach." These several assignments must be sustained. The appellant was not required to run all of its cars the entire length of its line, nor to provide for the transfer of passengers from one car to another. It might run its cars to such points or stations as would best subserve its own convenience and the convenience of the traveling public, and require passengers to take such cars only as would transport them to their destination without change. This the

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appellant did, and no more. The respondent took the wrong car by mistake, without fault on the part of the appellant or its agents, and for this mistake and the injury flowing therefrom he alone is responsible. As soon as the car destined for Ocean Beach had reached its destination, and the respondent was informed of that fact and requested to leave the car, it was his duty to do so, and as soon as he was given a reasonable opportunity to leave the car and refused, the relation of carrier and passenger ceased, and the respondent became a trespasser from that time forward. The appellant thereafter owed him such duty as it owes to trespassers and none other, and these facts appearing from the uncontroverted testimony the court should have so charged the jury. These errors call for a reversal of the judgment, but not for a dismissal of the action. As a trespasser the employees of the appellant might use such force as was reasonably necessary to eject the respondent from the car, in case he refused to leave of his own accord, but they could not lawfully eject him while the car was in motion, so as to endanger life or limb, nor could they willfully or unnecessarily assault him with impunity. The rights of common carriers and their employees in ejecting trespassers from cars were thus stated in *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108. "The rule is that in removing trespassers from a train the employees of the company may use such force as appears reasonably necessary, under all the circumstances, to accomplish the end in view; and, if the trespasser offers forcible resistance, a jury should not weigh with too much nicety the degree of force resorted to." In this case there was some testimony tending to show that a willful and unprovoked assault had been committed, and the weight of this testimony was for the jury. The appellant requested the court to charge the jury that it was in no event liable for the assault committed by the employee called the greaser. This employee had nothing to do with the operation of the cars, or with the receiving or discharging of passengers, and for an assault committed by him of his own volition and without the scope of his employment the company, of course, would not be liable. If, on the other hand, this employee was assisting the conductor in ejecting the respondent from the car at the express or implied request of the conductor the appellant would be liable for his acts in that connection.

The other assignments are not of sufficient importance to call for consideration or discussion; but for error in the instructions complained of the judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., and FULLERTON, MOUNT, ROOT, DUNBAR, and CROW, JJ., concur.

ST. LOUIS, I. M. & S. RY. CO. v. BRABBZSON.

(Supreme Court of Arkansas, July 6, 1908.)

[112 S. W. Rep. 222.]

Appeal and Error—Review—Verdict—Sufficiency of Evidence.—In testing the sufficiency of the evidence as a whole to sustain a verdict, the court must view it in the strongest light favorable to the findings of the jury.

Carriers—Injury to Passengers—Question for Jury.—In an action for personal injuries received by plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train while moving on after it had stopped near plaintiff's destination, and while she and other passengers were standing, preparatory to alighting, evidence of defendant's negligence held sufficient to go to the jury.

Same—Passengers on Freight Trains—Care Required:*—Though passengers riding on a freight train must be deemed to have assumed all the risks usually and reasonably incident to travel on such train, the carrier owes such passengers the same high degree of care to protect them from injury as if they were on a passenger train; its duty being modified only by the nature of the train and necessary difference in its mode of operation.

Same—Contributory Negligence—Question for Jury.†—In an action for personal injuries to plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train, while moving on after it had stopped near plaintiff's destination, and while she was standing, preparatory to alighting, holding to the knob of the door of the car, held, that plaintiff's contributory negligence was a question for the jury.

Same—Evidence—Sufficiency.—In an action for injuries to plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train, while plaintiff was standing, preparatory to alighting at her destination, evidence examined, and held sufficient to sustain a verdict for plaintiff.

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers on freight trains, see foot-note appended to *Rogers v. Choctaw, etc., R. Co. (Ark.)*, 18 R. R. R. 592, 41 Am. & Eng. R. Cas., N. S., 592, where all those preceding it are collected; *Vassor v. Atlantic C. L. R. Co. (N. Car.)*, 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629; *Lake Shore, etc., Ry. Co. v. Teeters (Ind.)*, 24 R. R. R. 36, 47 Am. & Eng. R. Cas., N. S., 36.

†For the authorities in this series on the question as to whether it is contributory negligence in a passenger to stand in a moving car, see foot-note appended to *Krumm v. St. Louis, etc., Ry. Co. (Ark.)*, 9 R. R. R. 821, 32 Am. & Eng. R. Cas., N. S., 821, where all those preceding it are collected; foot-note appended to *Abelson v. St. Louis, etc., Ry. Co. (Ark.)*, 27 R. R. R. 731, 50 Am. & Eng. R. Cas., N. S., 731.

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Damages—Excessive Damages—Personal Injuries.—In an action for personal injuries, it appeared that plaintiff's head, shoulder, back, and one of her thumbs were hurt, and two of her teeth were loosened. She was confined to her bed two or three weeks. At the time of the trial, about a year later, she still complained of the trouble in her back and shoulder, and that her hearing was defective. The physician who treated her, both before and after the injury, who saw her and prescribed for her the same day, but prior to the injury, testified that the defect in hearing was probably caused by catarrhal trouble, and that the continued pain in her back was attributable to kidney disease, with which she had been afflicted before the injury and for which he was treating her at the time. Held, that a verdict for damages in any sum over \$1,000 was excessive.

Hill, C. J., dissenting.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Action by Ada Brabbzson, by her next friend, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, unless plaintiff remits part of the damages recovered.

This is an action instituted by an infant, suing by next friend, against the railway company for damages for personal injuries received while she was a passenger on a local freight train which carried passengers regularly. She was a passenger enroute from Newport, Ark., to Tuckerman, and received the alleged injuries complained of when she was about to debark from the train at her destination. It is alleged in the complaint that, "upon the arrival of said train at Tuckerman, the same was stopped at the usual place for passengers to debark from said train, and the servant, agent, and employees of defendant upon said train called out the name of the station, Tuckerman, whereupon the passengers on said train began to debark therefrom, and this plaintiff also started to get off of said train, and, when she had reached the door of the car in which she was riding, the said train was again negligently and suddenly started, and pulled up a short distance, and was then negligently, recklessly, and suddenly stopped with a jerk and jar. Plaintiff, who was standing at the door holding to the knob to brace herself, not having time to again take her seat, was by said jerk and jar pitched out of the door onto the platform of said car, striking her head on the railing of the platform, and raising a contusion thereon, injuring her shoulder, and hurting her back and leg, and hurting her left ear, causing her to lose the hearing thereof, and mashing off thumb." The answer denied each allegation of the complaint, and charged that plaintiff had been warned to keep her seat until the train reached its proper place for her to alight, and that she would be notified as to the proper time and place to alight from the train. It further

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charged that she assumed the risks incident to riding on a freight train, and further charged contributory negligence. A jury trial resulted in a verdict in favor of the plaintiff for the sum of \$2,000, and the defendant appealed.

T. M. Mehaffy and J. E. Williams, for appellant.

O. W. Scarborough and Stuckey & Stuckey, for appellee.

McCULLOCH, J. (after stating the facts as above). Appellant challenges the sufficiency of the evidence, and contends that a peremptory instruction should have been given. The testimony introduced on behalf of appellee tends to show that, when the train reached Tuckerman, the caboose came to a standstill near a certain road crossing where it was accustomed to stop, or where it sometimes stopped (there being no regular stopping place for local freight trains), and all the passengers walked forward to the door preparatory to alighting, and some of them did alight at that time; that the train was then put in motion slowly and moved a very short distance, when it came to a stop with a sudden and unusually violent jerk, which threw appellee down, as described in the complaint, and inflicted the injuries complained of. She was standing at the door, holding to the doorknob, when the injury occurred. There was also testimony to the effect that, when the passengers went forward and reached the door, the conductor, who was standing on the ground near the caboose, called out to them telling them to stop; that the caboose would be pulled up to the crossing; that the train began moving just at that time, and appellee did not have time to take a seat before the violent jerk came and threw her down. Appellee testified that she did not hear the admonition of the conductor, and the evidence does not show that it was given so loud, or that he was so close to her that she must have heard it. She testified that she arose from her seat, and went forward because the other passengers did so, and that she did not have time, after the train began to move again, to take a seat before the jerk came. She was 14 years old when the injury occurred. The evidence of several witnesses tended to show that the jar caused by stopping the train the second time was sudden and an unusual and extraordinary one even for a freight train. The testimony of witnesses introduced by appellant tended to establish facts sufficient to exonerate the company entirely from the charge of negligence, but in testing the sufficiency of the evidence as a whole we must view it in the strongest light favorable to the findings of the jury. We are of the opinion that the evidence made out a case of negligence sufficient to go to the jury, and that the peremptory instruction was properly refused.

It is well settled that, though a passenger riding on a freight train must be deemed to have assumed all the risks usually and reasonably incident to travel on such trains, yet, where the rail-

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road company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on passenger trains. *Rodgers v. C. O. & G. Ry. Co.*, 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145; 113 Am. St. Rep. 102; *Pasley v. St. L., I. M. & So. Ry. Co.*, 83 Ark. 22, 102 S. W. 387. But, as it is not practical to operate freight trains without occasional jars and jerks calculated to throw down careless and inexperienced passengers standing in the car, "the duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated; and, while the general rule that the highest practicable degree of care must be exercised to protect passengers holds good, the nature of the train and necessary difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practicably exercised and consistent with the operation of a train of that nature." 4 Elliott on Railroads, § 1629. If the sudden stopping of the train, at the time and under the circumstances it is shown to have occurred, was accompanied by a jerk or jar as violent and extraordinary as is described by some of the witnesses, then the servants of the company were guilty of culpable negligence which rendered the company liable for damages to a passenger injured thereby. Appellee did not assume the risk of danger from such acts of negligence, and whether or not she was guilty of contributory negligence was a question for the jury. *Pasley v. Railway*, *supra*; *St. L., I. M. & So. Ry. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295. We conclude that there was sufficient evidence to sustain a verdict for damages, and that the case was submitted to the jury upon correct instructions. We are of the opinion, however, that the amount of the verdict is excessive.

The evidence shows that appellee was pitched forward through the door of the caboose, and that she fell on the platform; her head striking the railing as she fell. Her head, shoulder, back, and one of her thumbs were hurt, and two of her teeth were loosened. She was confined to her bed two or three weeks. A physician prescribed treatment once for her injuries. Her shoulder was swollen and she suffered considerable pain. At the time of the trial, about a year later, she still complained of the trouble in her back and shoulder, and that her hearing was defective. There is nothing to indicate from the character of the injury that it was calculated to cause a defect in her hearing, and a physician who treated her both before and after the injury, who saw her and prescribed for her the morning of the day on which she was injured, testified that the defect in her hearing was probably caused by catarrhal trouble with which she was afflicted before and after the injury, and that the continued pain in her back was attributable to disease of the kidneys with which

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she had been afflicted before the injury, and for which he was treating her at the time. There is no tangible or substantial evidence that the continued pain in her back and shoulder or that the defect in her hearing was caused by the fall; while, on the contrary, there is positive and uncontradicted evidence that these troubles were attributable to other causes. The jury had no right to speculate upon the possibility of these injuries being caused by the fall when there was no evidence directly to that effect. The result is that we see no evidence of a permanent injury to appellee from the fall. It was of a temporary nature, and, according to the evidence, the elements of damage were confined to pain and suffering for a period of two or three weeks. The shock at the time of the fall must have been quite severe, but the suffering for the next two or three weeks is not shown to have been acute.

We think that an assessment of damages at any sum over \$1,000 is excessive, but the evidence sustains a recovery of that amount. If the jury had assessed the damages at that or a less sum we would let it stand. *St. L., I. M. & So. Ry. Co. v. Snell*, 82 Ark. 61, 100 S. W. 67. If, therefore, appellee will within 15 days remit the amount of damages down to \$1,000, the judgment will stand affirmed; otherwise the judgment will be reversed and the cause remanded for a new trial

MOBILE, JACKSON, & KANSAS CITY RAILROAD COMPANY and Gulf & Chicago Railway Company, Plffs. in Err., v. STATE OF MISSISSIPPI, Mississippi Railroad Commission, *et al.*

(Argued April 29, 1908. Decided May 18, 1908.)

[28 Sup. Ct. Rep. 650.]

Error to State Court—Questions Reviewable—Local Law.—Questions whose determination depends upon the power of a state railroad commission, upon the petition of certain railway companies for the approval of a consolidation, and upon the order of the commission, made on the petition, are local, and not Federal, and cannot be reviewed on a writ of error from the Federal Supreme Court to a state court.

States—Power to Regulate Railroads.—Nothing in the Federal Constitution or statutes prevents a state from creating a board of railroad commissioners and prescribing their powers, or from regulating or forbidding the consolidation of railroad corporations, or from prescribing the routes of railroads, and providing that parallel and competing lines shall so remain.

Error to State Court—Federal Question—Decision on Non-Federal Grounds.—A state court, by resting its decision in a suit to require railway companies to construct their railroad through a speci-

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fied county seat, and to restrain them from abandoning a portion of the road, upon the ground that the petition by the railway companies to the railroad commission for approval of a consolidation, and its order thereon, constituted a binding contract, is not using a mere pretext to avoid the determination of the Federal questions arising in the case under the contract and commerce clauses of the Federal Constitution, where the power of the commission and the effect of its order were necessarily presented by the case.

Commerce—State Regulation—Railroad Route.—Interstate commerce is not burdened by requiring railroad companies to operate a particular line which they selected, or represented that they had selected, in a petition to the state railroad commission for approval of a consolidation, although compliance may entail expense, or require the exercise of eminent domain.

Error to State Court—Questions Reviewable—Local Law.—Whether railway companies waive their charter rights to change the line of a narrow-gauge road, and are estopped to revoke such waiver, by obtaining the consent of the state, through its railroad commission, to broaden and standardize that line through its entire length, is a local, and not a Federal, question, and cannot be reviewed on a writ of error from the Supreme Court of the United States to a state court.

Error to State Court—Federal Question—Impairing Contract Obligations.—Only when a judgment of a state court gives effect to subsequent legislation can the Federal Supreme Court review, as presenting a question of the impairment of contract obligations, its decision holding invalid, under the state Constitution, a state law which is alleged to constitute a contract.

In error to the Supreme Court of the State of Mississippi to review a decree which, on a second appeal, affirmed, with some modifications, a decree of the Chancery Court of Pontotoc County, in that state, requiring railway companies to broaden and standardize a narrow-gauge road through its entire length. Affirmed. See same case below on first appeal, 86 Miss. 172, 38 So. 732; on second appeal, 89 Miss. 724, 41 So. 259.

Statement by MR. JUSTICE McKENNA:

This is a bill in equity, brought by the state of Mississippi and the Railroad Commission of that state, to require the railroad companies to construct their railroad through the county seat of Pontotoc County, state of Mississippi, and to restrain them from abandoning a portion of the narrow-gauge railroad formerly operated by the Gulf & Chicago Railroad Company, which ran to the town of Pontotoc.

The following is a summary of the bill: The railroad commission exists under the laws of the state of Mississippi, and is, under the laws, charged with the duty of supervising railroads and other common carriers, and also with the duty of enforcing

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the observance of the laws by such companies and other carriers. The Gulf & Chicago Railway Company was organized in 1903, under the laws of Mississippi, with authority to construct a railroad from the town of Decatur, Mississippi, in a general northerly direction, through the county of Pontotoc, and through the state of Mississippi to the Tennessee line. At the time of the organization of such railway company there was in existence from the town of Pontotoc, Mississippi, to the town of Middleton, Tennessee, a narrow-gauge road, which was operated by the Gulf & Chicago Railroad Company, a corporation under the laws of Mississippi. The railroad company was bound to continue and preserve intact throughout its entire length the narrow-gauge road, and the Gulf & Chicago Railway Company and its lessee, the Mobile, Jackson, & Kansas City Railroad Company, hereafter called the Mobile Company, were in turn bound to so continue and preserve intact the said line, "broadened and standardized as was stipulated in the articles of consolidation hereinafter set forth." Prior to the 6th of July, 1903, the Gulf & Chicago Railway Company and the Gulf & Chicago Railroad Company, with other railroad companies, were consolidated under the name of the Gulf & Chicago Railway Company, and on that day a petition was presented to the railroad commission, praying the approval of the consolidation. It was stipulated in the petition, and by the granting of it by the commission it was agreed, that the consolidated corporation should broaden and standardize the narrow-gauge road running from the town of Pontotoc, "as it then existed and was being operated," and that, when broadened and standardized, it should be a part of the main line of the Gulf & Chicago Railway Company, extending from Decatur, Mississippi, to Jackson, Tennessee. The petition and order were made part of the bill.

On or about the time of the consolidation, approved as aforesaid, the Gulf & Chicago Railway Company leased to the Mobile Company all of its railroad property then constructed and operated, and that thereafter to be constructed, including the narrow-gauge road from Pontotoc to Middleton, and including its entire proposed line from Decatur to Jackson, and since the execution of the lease the Mobile Company has been in control and operation of the narrow-gauge road. The Gulf & Chicago Railway Company, in violation of the terms and in disregard of the representations contained in its petition to the commission, has broadened and standardized the narrow-gauge road to a point one mile and a half from the end of the line in Pontotoc county, and is operating the same. The remaining part, which is the most important part of the road, extending through a thickly populated district in the principal portion of Pontotoc, has been abandoned. It was a material consideration, in passing on the petition for consolidation, and the consolidation would not have been approved but for the representation that the company would standardize and broaden the line extending into the town.

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The narrow-gauge road was constructed in 1887 by the Gulf & Ship Island Railroad Company. When it was extended into Pontotoc a right of way was obtained by purchase, by the exercise of the right of eminent domain and by donations by the community, and when the right of way was selected it was with the view of extending the road south through the town. The town was built and established, and the town has been building for the last twenty years, with reference to the line of railroad then so located. The interests of the public are involved in the change of road; the convenience and comfort of more than 1,000 people are involved; the change of road would disturb established conditions, and practically break up a prosperous community of the defendants and a few property owners in another part of the town, recently added thereto, and through which it is proposed to run the new line of railroad. The original town of Pontotoc is the county seat of Pontotoc county, as fixed by the legislature of the state, and § 187 of the Constitution of the state provides that no railroad thereafter constructed in the state "shall pass within 3 miles of any county seat without passing through the same, and establishing and maintaining a depot therein, unless prevented by natural obstacles; Provided such town or city shall grant the right of way through its limits and sufficient ground for ordinary depot purposes." The Gulf & Chicago Railway Company is constructing its new line within 3 miles of Pontotoc without passing through the same. There are no natural obstacles in the way. The citizens stand ready to grant the right of way through the limits of the town and sufficient grounds for depot purposes. In fact, the company owns a right of way through a large part of the town and sufficient grounds for depot purposes. The conduct of the company is in violation of the Constitution, and in wilful disregard of the law and of the order of the commission and the rights of the public.

The inadequacy of the remedy at law is alleged.

The injunction prayed was against the construction of the line of road proposed, and to command the defendant to broaden and standardize the line of road extending through the town of Pontotoc, and to compel its operation into the said county seat as a part of the line built and to be built from Decatur, Mississippi, to Jackson, Tennessee, and to extend the said line on through to the said county seat, as required by said § 187 of the Constitution of the state of Mississippi, and as required by law and by the order of the complainant, the Mississippi railroad commission. General relief was also prayed.

The answer of the defendant companies, in addition to traversing the allegations of fact of the bill, alleges the following: Prior to the filing of the petition, seeking the approval of the railroad commission of the state to the consolidation of the railroads, the officers of the companies had caused surveys to be made

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through the town of Pontotoc, with the view to best serve the interest of the people of that community in the location of the line of railroad and the establishing of its depot in the town, and it became apparent that it would be impossible to utilize that portion of the narrow-gauge line extending north about one mile from the depot. This was submitted to the people of the town prior to the application for consolidation, in a meeting called for that purpose, and, by an overwhelming majority, the position taken by the officers of the companies was acquiesced in and approved. Before the filing of the bill the companies had located and constructed their line as proposed at such public meeting, had purchased a depot site, and erected a handsome and commodious depot on the site, into which it is now operating a standard-gauge road. And all of this done before the filing of the bill.

The railroad commission made an order in the month of June, 1904, requiring the companies to build a depot on that part of the line of the narrow-gauge road since abandoned, and upon the old site of the depot used by that road, and outside of the original town of Pontotoc, the enforcement of which was enjoined by the United States circuit court for the southern district of Mississippi, which suit is now pending. The commission is still insisting upon the order and resisting the efforts of the companies to enjoin its enforcement. Such order, it is alleged, is inconsistent with the bill in this case.

The line of road now being constructed by the Gulf & Chicago Railway Company from Decatur to Jackson is being constructed upon a different scheme of grades from that upon which the narrow-gauge line was constructed, and necessarily adopted to enable the company to transact its business with the least expense, and with the view of enabling it to successfully meet the competition of other lines. If the grades of the narrow-gauge road had been adopted it would have been practically impossible for the railway company to operate successfully, because of the heavy grades, and would have caused an additional cost of construction of \$90,000; would have lengthened the road, increased the fixed charges of maintaining the property, increased the cost of operation, and the cost to the company of transacting all interstate commerce business from Mobile, Alabama, to Tennessee.

By amendments subsequently made to the answer it was alleged that when the consolidation of the companies was had it was the purpose (which was well known to the railroad commission) of making the consolidated company a through trunk line of railroad for interstate commerce and the transmission of the mails, and that one of the vital objects to be attained was to shorten the line in every way possible. It is further alleged that a refusal to permit the execution of such purpose "will impose unnecessary and unreasonable burdens upon the interstate commerce, and will

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violate in letter and spirit § 8, article 1, of the Constitution of the United States. And it is alleged that the southern end of the old narrow-gauge road line runs into deep hollows and ends in a cluster of big hills, which, to cut through, would cause great expense and entail long delay; that the line would thereby be lengthened, and it would be hampered and prevented from doing an interstate business in successful competition with other lines."

The case, on the petition of the railroads, was removed to the circuit court of the United States for the eastern division of the northern district of Mississippi, and was subsequently remanded to the state court on motion of the defendants in error.

A temporary injunction was granted, enjoining and commanding the Mobile Company and the Gulf & Chicago Railway Company to "absolutely refrain from constructing and operating a certain line of railroad from Decatur, Mississippi, to Middleton, Tennessee, or any other line of railroad from any point whatsoever to any other point passing within 3 miles of the county seat of Pontotoc county, Mississippi, as the said county seat was originally laid out, marked, and established, without passing through the said county seat."

Upon motion of the companies, and after proofs submitted, a decree was entered, dissolving the injunction, the decree reciting that all of the relief prayed for by the bill could be obtained by a mandatory injunction if the allegations of the bill should be sustained upon the final hearing; and further reciting that "the public interests of the county north and south of the town of Pontotoc, along the line of said railroad, as well as the interests of the railroad, will suffer by reason of the continuance of the injunction, and remanded the case to the chancery court. 86 Miss. 172, 38 So. 732.

The supreme court of the state reversed the decree, reinstated the injunction and remanded the case to the chancery court. 86 Miss. 172, 38 So. 732.

After a trial upon the merits, the chancery court entered a decree, making the injunction perpetual. The decree was affirmed by the supreme court. 89 Miss. 724, 41 So. 259. Other facts will appear in the opinion.

Messrs. William Hepburn Russell, E. K. Stallo, and Edward Mayes, for plaintiffs in error.

Messrs. Hannis Taylor and Robert V. Fletcher, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court:

The defendant railroad companies, in their motion to dissolve the temporary injunction, urged as grounds thereof, among others, that the injunction imposed a direct and unnecessary burden upon, and was an interference with, interstate commerce, and an interference with the carrying of United States mail. To those

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grounds the court did not apparently respond, and the supreme court did not refer to them in either of its opinions.

Counter contentions are urged. Plaintiffs in error contend that the Federal questions set up by them were evaded. Defendants in error contend that such questions were not involved and are not now presented for consideration.

The opinion of the supreme court on the first appeal was very elaborate, and we can only give a brief summary of the propositions decided. The court gives a summary of the facts of the bill, the averments of the petition to the commission, and the terms of its order, and says that, "waiving minor considerations not sufficiently developed by the proof," and "passing at once to the very heart of the matter," the case divided into two main branches:

"1. What is the true interpretation to be given § 187 of our Constitution, and has it any application to the facts of this litigation? 2. What are the legal rights of the citizens of the town of Pontotoc and the duties of the appellees as to the narrow-gauge road which was in use and active operation before and at the consolidation hereinbefore referred to and at the date of the leasing of its property by one appellee to the other?"

Under the first branch the court decided that appellants (defendants in error here) could, under the facts of the record, be "afforded no relief by the language or intendment of § 187 of the Constitution." This branch of the case, therefore, needs no further consideration.

As elements in the discussion and decision of the second branch of the case, the court said that had there been no consolidation between the Gulf & Chicago Railroad Company and the Gulf & Chicago Railway Company, and the latter company had constructed its road over the route and in the direction specified in its application for incorporation, it would inevitably have been a parallel and competing line with the narrow-gauge line then in existence, and the consolidation of the roads would not have been permitted. "More than this," it was said, "an express grant of power by the legislature for the two companies to consolidate * * * would have been void, as being in contravention of the general statutory inhibition against consolidation or purchase of competing lines of railroads, which cannot, without violating § 87 of the Constitution [of the state], be suspended 'for the benefit of any individual or private corporation or association.'" And to sustain this proposition *Yazoo & M. Valley R. Co. v. Southern R. Co.* 83 Miss. 746, 36 So. 74, was cited. It was deduced from § 3587 of the Code of the state of 1892, that the statement in the petition that the roads were "in no way parallel or competing lines" were statements of jurisdictional facts, "upon the existence of which depended the power of the corporations to consolidate." And following *Lusby v. Kansas City, M. & B. R. Co.*, 73 Miss.

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364, 36 L. R. A. 510, 19 So. 239, the court held that the Gulf & Chicago Railroad Company was without power to abandon or relocate any portion of its line, "except on the score of 'imperious necessity.'" An exception, it was said, not suggested by the facts of this record. These restraints and duties, it was further said, came to the consolidated corporation.

On the return of the case to the chancery court, and after a hearing on the merits, that court entered a decree making the injunction perpetual. The decree recited that the court found "as a fact" that a valid contract existed between the Gulf & Chicago Railroad Company and the citizens of Pontotoc, which provided that the line of the railway of the Company should be established and maintained where the same was established and maintained before the consolidation of that company with the other companies, and that the town had not given its assent to the abandonment of that line. The court further found "that no natural obstacles or imperious necessity prevents the said defendant companies from broadening and standardizing" the narrow-gauge road "and making it a part of the main line of the proposed railroad, and no such obstacles or necessity exist to prevent the said companies from extending their said line from the southern terminus of the said original line * * * and that the allegations of the bill have been sustained by the proof, and that the complainants are entitled to the relief prayed for." The supreme court affirmed the decree of the chancery court, repeating, with some modifications, the principles which it expressed on the first appeal of the case. It said that in a former opinion the court expressly held that "the consolidation was conditioned upon the broadening and standardizing the then-existing narrow-gauge railroad, and make it a part of the main line of railroad operated by the consolidated corporation." And it was alone, it was further said, upon the compliance with those conditions, that the railroad commission consented to the consolidation, and without which the commission would have had no power to authorize the consolidation, and without which the consolidation would not have been effected. So insistent was the condition, the court held, in view of the fact that the roads would otherwise be parallel and competing roads, that the legislature could not relieve from it without violating § 87 of the Constitution of the state.

The court expressed the law of the state to be that parallel and competing roads could not consolidate, and that other roads could only consolidate with the consent of the railroad commission. And it was also said that the roads, recognizing the law, stated in their petition to the commission "that the railroads were 'in no way parallel or competing lines,' and expressly pledged themselves to broaden and standardize the then-existing narrow-gauge railroad, and to make it a part of the main line operated by the consolidated corporation. * * * And it is upon this ground.

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and this ground alone, that we now hold that the decree of the chancellor should be affirmed." The court took pains to repeat this limitation. And, excluding other questions, the court said that it had nothing to do with the location of the depot, and that it dealt alone with the "obligation entered into" by the companies with the commission; "that only," to quote the words of the court, "is the core of this contention, and that, and that precisely, is what we deal with and decide in this case; to wit, that these appellants [plaintiffs in error here] are bound by their solemn obligation, deliberately entered into, as stated above, to broaden and standardize the narrow-gauge railroad and to make it a part of the main line."

We have made these full quotations from the opinions and decrees of the state courts to clearly show what facts were found and what principles of law laid down, that we might estimate the Federal questions which it is contended are involved in the case. We have seen that the Federal grounds invoked in the motion to dissolve the temporary injunction were that the injunction imposed a direct and unnecessary burden upon, and was an interference with, interstate commerce, and was an interference with the carrying of the United States mails. In the amended answer the same grounds were repeated with more circumstantiality, and § 8, article 1, of the Constitution of the United States, was invoked.

The same grounds were practically repeated in the assignment of errors on the appeal to the supreme court of the state, and, in addition, the provision of § 10, article 1, which prohibits any state from impairing the obligation of a contract, was invoked on the ground that the decree of the chancery court impaired "the obligation of the contract right to change the location of the narrow-gauge road, embodied in § 8 of the charter of the Ripley Railroad, and in the articles of organization of the Gulf & Chicago Railroad Company."

In the assignments of error in this court the plaintiffs in error have, for the first time, invoked the 14th Amendment to the Constitution of the United States. To sustain this assignment it is contended that the supreme court of the state, by directing the consolidated company "to operate the spur track as soon as completed, connecting the main line on the north with the town of Pontotoc," deprives plaintiffs in error of their property without due process of law. And a like result is produced, it is also contended, by the decision of the court holding the "Stegall bill," so called, to be invalid. The latter ground will be referred to hereafter. Of the other, it is said, it arose for the first time upon the decree and opinion of the supreme court, as it is further said that the decree of the chancery court did not deny the rights of the companies under the 14th Amendment. It is difficult to appreciate the contention. The decree of the chancery court recited,

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among other things, that no natural obstacles existed to prevent the companies from extending their line "from the southern terminus" of the original line, and enjoined the companies from building and operating any line that "did not include or comprise the original line of the Gulf & Chicago Railroad Company, as originally constructed and maintained," required them to broaden and standardize the entire line of the original narrow-gauge railroad, and to construct their line of railway in such a way as to include as part of the main line "all of the line of the narrow-gauge line." And it was commanded that the work commence within thirty days and be finished within sixty days. The supreme court, in its opinion, said: "In view of the various interests here involved, we direct the appellant to operate the spur track as soon as completed, connecting the main line on the north with the town of Pontotoc." The court therefore accepted and approved what was already done, and modified the decree of the chancery court in the interest of the companies. And it besides extended the time for compliance with the decree from sixty days to six months. But aside from this, all of the contentions of the companies (except that based on the "Stegall Bill," which will be presently considered) depend upon the power of the commission, the petition of the companies, and the order of the commission upon the petition. And these, we think, were all local questions, the decision of which we have no power to review. There is nothing in the statutes or Constitution of the United States which prevents a state from creating a board of railroad commissioners, and what powers the board shall have will depend upon the law creating them, of which the courts of the state are the absolute interpreters. Whether corporations shall remain separate or be permitted to consolidate is a matter of state regulation and provision. It is competent also for a state to prescribe the route of the railroad it creates, and to provide that parallel and competing lines shall remain so. And this power was exercised by the state of Mississippi. It is not exactly clear whether this is disputed by the companies. It is, however, contended that the commission is a mere administrative agency, and that its only real power or duty in the matter of consenting to consolidations is to determine that such consolidations are not of parallel or competing roads, and that the commission has nothing whatever to do with the terms of the consolidation. And it is further contended that there was no agreement or contract of any kind between the companies and the commission, that the order of the commission was "merely an official finding that the two roads came within the necessary statutory requirements," and that the attempt of the supreme court to base its decision and decree upon the ground that the petition and order constituted a contract binding upon the plaintiffs in error was a "mere pretext, intended to avoid the determination of the Federal questions

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arising in the case, and to place its decision on a non-Federal ground." We cannot assent to this view. The power of the commission and the effect of its order were necessarily presented by the case. They were grounds of suit. They became, therefore, the immediate and primary questions to be decided. The power of the commission, and the effect of its order, depended upon the statutes of the state, and of them, as we have said, the supreme court is the absolute interpreter. The matter is exceedingly simple and is best explained by the reference to the opinion of the supreme court of the state. The court declared that the roads, but for their consolidation, would have been parallel and competing roads, and, in order to make their consolidation,—in order to give the commission power to consent to their consolidation,—the companies represented that the roads were not parallel and competing. Of course, they would not be if they were made parts of one line. And it was represented that they would be made parts of one line,—to be made so by the broadening of the narrow-gauge road, not by its abandonment in whole or in part. Upon this representation,—upon this condition,—the consent of the commission was invoked and secured.

Much more discussion is unnecessary. It is enough to add to that which we have said, that the decree of the supreme court does not work an interference with, or cast a direct burden upon, interstate commerce. The case of the Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; and Mississippi R. Commission v. Illinois C. R. Co., 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90, cited by the companies to sustain their contentions, are not apposite. In those cases there was an interference with interstate trains for local purposes, though local needs had been adequately supplied. In the case at bar there is the insistence of the operation of a particular road, which the companies themselves selected or represented that they had selected. That compliance will entail expense or require the exercise of eminent domain will not make it a burden upon interstate commerce. Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. Besides, the comparative expense of roads we must assume was considered when the petition to the commission was made.

It is further contended by the companies that they had the right, under § 8 of the charter of the Ripley Railroad Company, to change the location of its line through the town of Pontotoc, and that the charter constitutes a contract which is impaired, it is further urged, by the laws creating the railroad commission, as interpreted by the supreme court of the state. Section 8 of the charter provides that, for the purpose of making the railroad provided for in § 2, "or repairing or changing it afterwards," the

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railroad shall have rights of entering upon adjoining land, etc., upon making compensation to the owners. What power this section confers may be open to dispute. It may be said that the right of "repairing or changing" the railroad does not give the power to abandon it. However, the supreme court did not pass upon the meaning of § 8. The court said if that section gave the companies the power to change the line of the narrow-gauge road as they desired, they waived it, and are estopped to revoke it by their obtaining the consent of the state through its railroad commission to broaden and standardize that line through its entire length. This was a question for the supreme court to decide. It was fairly presented to the court. We cannot question the motives of its judgment; indeed we cannot say that we dissent from it. At any rate, it is not reviewable. *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Hale v. Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *Schaefer v. Werling*, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

The final contention of plaintiffs in error is based on the act of the legislature of the state, called the "Stegall bill." This act was passed after the decree of the chancery court, and it is contended that it is an express legislative enactment which approved the location by the Gulf & Chicago Railway Company, as consolidated, of its railway through the town of Pontotoc, and authorized a continuance of the same on condition that it should broaden and standardize the track into the old town and to the site of the old station. These conditions, it is asserted, were performed, and a contract was hence entered into between the state and the railroad company, and that the decision of the supreme court, "denying the obligation of this contract, is either (a) a law impairing the obligation of a contract; or (b) a denial to the plaintiffs in error of the equal protection of the laws; or (c) the taking of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States."

The supreme court decided that the bill was unconstitutional, saying: "So far as the Stegall bill is concerned, it is perfectly obvious, as already held in the former opinion, that this special act, which was in substance for the benefit of this particular corporation, was, under the general statute laws which we have just referred to with respect to consolidation, palpably and manifestly violative of § 87 of the Constitution, and plainly null and void." This conclusion is attacked, and our construction is invoked of the constitutional provision against that made by the supreme court of the state.

We are unable to yield to the appeal. It is only when the judgment of a state court gives effect to a law subsequent to that (or it may be a constitution) which it is alleged constitutes a

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contract, that we may review the judgment and decide the question of contract. And this would involve the construction of the law. But the record presents no such case. The "Stegall bill," it is true, is claimed to be a contract, but its validity is not asserted against a subsequent law. It is asserted against prior laws and the Constitution. The decision of the court, therefore, was of that kind that a court is often called to make under the laws and Constitution of its state. To assert error in the decision, or even to be able to demonstrate it, does not invest us with power of review. Nor do the other supposed consequences of the decision of the supreme court give us jurisdiction to review it. That it denies the companies the equal protection of the law, we may say, is without any foundation. No discrimination against them is pointed out, and to say that the decision takes their property without due process of law is only another way of saying that they had a contract, the obligation of which is impaired. Of course, they assert rights under the "Stegall bill," but in that they present a very common case, within the exclusive jurisdiction of the state court.

Judgment affirmed.

ERIE R. CO. v. STAR & CRESCENT MILLING CO.

(Circuit Court of Appeals, Seventh Circuit, April 14, 1908.)

[162 Fed. Rep. 879.]

Carriers—Connecting Carriers—Transportation of Freight—Storage—Negligence.—Where a connecting carrier permitted flour to remain in its warehouse for 49 days before forwarding the same because of a shortage of cars, without notifying the shipper, knowing that the detention would be unusual, thereby preventing the shipper from protecting itself by insurance, and the flour was totally or partially destroyed by the burning of the warehouse, the carrier was chargeable with such negligence as made it responsible for the loss of the flour, notwithstanding a provision in the bill of lading that no carrier should be liable for the loss of the goods or damage thereto by fire.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Seymour Edgerton, for plaintiff in error.

Fred D. Silbur, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the Circuit Court was by the defendant in error against the plaintiff in error, to recover

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damages for the loss of a certain shipment of flour from Chicago to New York, and resulted in judgment for the value of the flour and interest.

The bills of lading contained a provision that "no carrier in possession of all or any of the property herein described, shall be liable for any loss thereof, or damage thereto, by causes beyond its control, or floods, or by fire." The flour having arrived in Buffalo by way of the lakes was, owing to a shortage of cars of the plaintiff in error, detained in the transfer warehouse for forty-nine days, at the end of which time it was either totally or partially destroyed in a fire in such warehouse.

There was evidence offered tending to show that at the time the flour was accepted, the car shortage at Buffalo was known to the plaintiff in error, but that no notice of that fact was given to the defendant in error; and no notice of the detention was given to the defendant in error during the forty-nine days that the flour was detained.

Assuming that the failure of the plaintiff in error to deliver the goods at the destination named in the bill of lading was due to the fire at Buffalo in the transfer warehouse of the plaintiff in error, we are compelled to affirm this judgment; for we think that the plaintiff in error's act in permitting the flour to remain in its warehouse without notice to the milling company, and with knowledge that the detention, owing to the blockade of cars, would be unusual, thereby preventing the milling company from protecting itself by insurance, was such negligence as made the railroad company responsible for its safety.

The judgment of the Circuit Court will be affirmed.

McCULLY *et al.* v. CHICAGO, B. & Q. Ry. Co.

(Supreme Court of Missouri, May 13, 1908.)

[110 S. W. Rep. 711.]

Constitutional Law—Deprivation of Property—Due Process of Law.*—Rev. St. 1899, § 1085 (Ann. St. 1906, p. 933), in so far as it requires railroad companies to furnish free return transportation to shippers of stock by car load over the line of their road or roads to the point from which shipment is made, is invalid as a deprivation of property of the carrier without due process of law, in violation of the fourteenth amendment of the federal Constitution.

Same—Equal Protection of Law.*—Such section is also invalid as a denial to the carrier of the equal protection of the law, in that it denies to railroad companies the right to charge and exact payment of tolls or fares for the transportation of shippers of stock over their lines which they are allowed to charge other shippers for the same service.

Woodson, J., dissenting.

In Banc. Appeal from Circuit Court, Linn County; John P. Butler, Judge.

Suit by W. E. McCully and others, constituting the Board of Railroad and Warehouse Commissioners, against the Chicago, Burlington & Quincy Railway Company. Decree for complainants, and defendant appeals. Reversed and dismissed.

O. M. Spencer, A. W. Mullins, and H. J. Nelson, for appellant.
H. S. Hadley, Atty. Gen., and *John Kennish*, for respondents.

BURGESS, J. This proceeding was instituted in the circuit court of Linn county by plaintiffs, in their official capacity as members of the Board of Railroad and Warehouse commissioners, against the defendant, under section 1150, Rev. St. 1899 (Ann. St. 1906, p. 983). It is provided by section 1085, Rev. St. 1899 (Ann. St.

*For the authorities in this series on the constitutionality of statutes prescribing penalties to compel common carriers to perform their duties to the public, etc., see foot-note appended to *Houston & T. S. R. Co. v. State* (Tex.), 28 R. R. R. 94, 51 Am. & Eng. R. Cas., N. S., 94; first foot-note appended to *Morris-Moffett Co. v. Southern Express Co.* (N. Car.), 28 R. R. R. 122, 51 Am. & Eng. R. Cas., N. S., 122; foot-notes appended to *Efland v. Southern Ry. Co.* (N. Car.), 27 R. R. R. 693, 50 Am. & Eng. R. Cas., N. S., 693; foot-note appended to *Toledo, etc., R. Co. v. Long* (Ind.), 27 R. R. R. 168, 50 Am. & Eng. R. Cas., N. S., 168; *State v. St. Louis & S. F. R. Co.* (Ark.), 27 R. R. R. 110, 50 Am. & Eng. R. Cas., N. S., 110; *Cardwell v. North Carolina R. Co.* (N. Car.), 27 R. R. R. 89, 50 Am. & Eng. R. Cas., N. S., 89; *Lawrence v. Rutland R. Co.* (Vt.), 27 R. R. R. 14, 50 Am. & Eng. R. Cas., N. S., 14; foot-note appended to *Hull v. Seaboard Air Line Ry.* (S. Car.), 26 R. R. R. 281, 49 Am. & Eng. R. Cas., N. S., 281.

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1906, p. 933), that, in case of the shipment of live stock by the car load, railroad companies shall pass the shipper or his employee to and from the point designated in the contract or bill of lading, in consideration of the price paid for the car, and without further expense to the shipper. Informal complaints having been made to the Board of Railroad and Warehouse Commissioners that the defendant railway company was refusing to furnish shippers of live stock by the car load with return transportation, a hearing was had before said board, due notice having been given to defendant, after which hearing an order was made by the board directing the defendant to pass the shipper of live stock, or his employee, to and from the place designated in the contract, or bill of lading, as provided in said section 1085. The order thus made was duly served upon the defendant, and, upon its refusal to comply therewith, this suit was instituted by plaintiffs to enjoin the defendant from violating the order of the board and the provisions of said section 1085. The defendant demurred to the petition upon the following grounds: "(1) Because said petition does not state facts sufficient to constitute a cause of action. (2) Because section 1085 of the Revised Statutes of Missouri of 1899, upon which plaintiff's complaint is founded and their said petition predicated, is invalid and void, because it is repugnant to and in conflict with the fourteenth amendment to the Constitution of the United States, in this: That said statute operates as a deprivation of property without due process of law, and is a denial of the equal protection of the laws, in denying to railroad companies the right to charge and exact the payment of tolls or fares for the transportation of persons over their lines. (3) Because said section of the statutes undertakes to require railroad companies, as common carriers, to render valuable service without compensation." The demurrer was overruled by the court, and, the defendant declining to plead further, final judgment was rendered as prayed for in the petition, from which judgment defendant appealed to this court.

It is insisted by defendant that the court below erred in overruling the demurrer interposed by it to the petition, and in rendering judgment against the defendant and in favor of plaintiffs, because section 1085, Rev. St. 1899 (Ann. St. 1906, p. 933), upon which the complaint is predicated, is repugnant to and in conflict with the fourteenth amendment to the Constitution of the United States, and therefore void.

The statute in question is as follows: "Sec. 1085. Whenever any railroad company or corporation doing business within the limits of this state shall receive and ship any live stock, or watermelons when shipped with the privilege of peddling along the line of said road or roads, by the car loads, said company shall, in consideration of the price paid for said car, pass the shipper or his employee to and from said point designated in contract or bill

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of lading without further expense to shippers, under penalties as in the two preceding sections: Provided, that this section shall not be so construed as to permit a shipper of live stock to peddle the same along the line of said road or roads."

This section of the statute was enacted in 1889, and approved June 12th of that year. Sess. Acts 1889, p. 63, c. —. The head-notes or catchwords to the act and the title thereto are as follows:

"Corporations: Railroads—Shippers to Ride Free, When. An act to amend an act to require railroad companies, or persons owning or operating any railroad or railroads in this state to furnish suitable and convenient cars for shipping live stock, and transporting and delivering the same to consignees at any station or stockyard in this state, approved March 31, 1887, by adding a new section thereto.

"Section 1. Company to pass shippers," etc.

The Legislature of this state in 1875 enacted for the first time a statute fixing the maximum rates authorized to be charged by railroad companies for the shipment of live stock in car loads within this state. These rates were "not exceeding ten dollars per car load for the first twenty-five miles, and not exceeding seven dollars per car load for the second twenty-five miles, and four dollars per car load for each additional twenty-five miles, or fractional part thereof, unless the fraction be less than thirteen miles, in which case the rate shall not exceed two dollars per car load for such fractional part." Sess. Acts 1875, p. 114, § 4. This statute was brought forward and incorporated, without amendment, into the Revisions of 1879, 1889, and 1899, being section 1194, Rev. St. 1899 (Ann. St. 1906, p. 1005). Railroad companies were thus limited in the charges they might make for shipping live stock when the act of 1889 was passed, now section 1085, Rev. St. 1899 (Ann. St. 1906, p. 933). Prior to the said act of 1889 there was no statute requiring railroad companies to furnish shippers of live stock or their employees free transportation. While it is conceded by defendant that the Legislature has the power to fix the maximum rates which railroad companies may charge for the transportation of persons and property, provided such rates be just and reasonable to both the carrier and the public, it insists that the Legislature cannot "enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper"—citing *Lake Shore & Mich. Ry. Co. v. Smith*, 173 U. S. 695, 19 Sup. Ct. 565, 43 L. Ed. 858. The right of the defendant to charge and collect fares or tolls for the transportation of persons and property over its line is the essence of its franchise, and to trench upon this right would be to deprive it of its property without due process of law, and to deny to it the equal protection of the law. The said fourteenth amendment to the Constitution of the United States, among other things, pro-

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vides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Railway Co. v. Campbell, 61 Kan. 439, 59 Pac. 1051, 48 L. R. A. 251, was an action against the railway company to recover a sum of money paid as passenger fare on the line of the road of the company from Kansas City, Kan., to Attica, Kan. The plaintiff in the case shipped a car load of live stock from the latter place to the former. On the going trip he rode free on a stock shipper's contract issued to him by the railroad company's agent at the shipping point, and on the return trip demanded to be carried free, in accordance with the provisions of chapter 167, p. 355, Laws Kan. 1897. This demand was refused, and, to avoid ejection from the train, he paid the required fare. He then brought action to recover the amount paid, together with an attorney's fee for the prosecution of the suit. Judgment was rendered in his favor, first by a justice of the peace, next by the district court, and lastly by the Court of Appeals. The railroad company prosecuted error to the Supreme Court. The only question involved in the case was the constitutionality of the enactment under which the demand for free transportation was made; the title of the act and the only section necessary to refer to in this case being as follows:

"An act to amend chapter 195 of the Laws of 1895, being an act entitled 'An act to require railroad companies to furnish free transportation to shippers of stock in certain cases, and providing a remedy in case of failure or refusal on the part of the railroad company to comply with the provisions of this act.' To provide a penalty for the violations of the provisions of this act, and repealing all acts and parts of acts in conflict herewith."

"Section 1. That section 1 of chapter 195 of the Laws of 1895, be amended so as to read as follows:

"Section 1. Whenever any railroad company, or corporation, doing business within the limits of this state shall receive and ship any live stock by the car load, said company, in consideration of the usual price paid for the shipment of said car, shall pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare: Provided, however, that in all cases where a shipper ships more than one car load of stock at the same time the said railroad company shall be and is hereby required to pass free, as aforesaid, only one additional person, shipper, or employee, for every three car loads shipped in addition to the first car load."

It was held by the court that said act, in requiring railroad companies to furnish free transportation to shippers of live stock in

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certain cases, was a deprivation of property without due process of law, and a denial of the equal protection of the laws, and therefore unconstitutional and void under the fourteenth amendment to the federal Constitution. The court said: "The property of a railroad company consists, not alone in its franchise to be a corporation, nor its right of way and track, nor its rolling stock and other tangible property, but it consists in its most essential character and important sense in the right to charge and collect tolls for the transportation of persons and property over its line. Without the right to take tolls such corporation could not do business, and a denial of its right to take tolls would as effectually render valueless all of its other property as a confiscation of its other property would defeat its ability to carry on its business. Upon the conception of the right to take tolls as a species of property belonging to railroad corporations rest all the decisions of all courts, both state and federal, denying the right of state Legislatures to restrict such tolls below a reasonable amount. It needs but a glance at the act in question, and but a moment's thought over the consequences to result from a sanction of its provisions, to perceive that it strikes vitally at the fundamental right of a railroad company to own and enjoy that species of property which exists in the form of its franchise to charge and collect tolls. It purports in its title to be, and is, 'An act to require railroad companies to furnish free transportation to shippers of stock in certain cases,' and in its body it requires railroad companies, 'in consideration of the usual price paid for the shipment of a car of stock, to pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expenses to the shipper in the way of fare.' Upon no theory whatever consistent with the idea that the franchise of railroad companies to take tolls is a species of property, or consistent with the adjudications of the courts that such right of property is protected by the fourteenth amendment to the federal Constitution, can such an enactment be upheld. Once grant that so much of the property of railroad companies as is involved in their right to charge passenger fare to shippers of stock can be taken away by legislative enactment, and it necessarily follows that the like property of theirs which consists in their right to charge passenger fare to other shippers of other kinds of property can also be taken away for like reasons; and once grant, upon like considerations, that the property right of railroad companies to take tolls for passenger carriage can be thus taken away, and the right to take tolls for freight transportation can be likewise taken away; and once grant that the right to take toll for freight and passenger carriage can be taken away, and it follows that the right to own and possess the rolling stock and other like property necessary to the operation of the road can be likewise taken away. In short, there would be no end to the extension of legislative

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authority over the right of railroad companies to own and enjoy property.”

Lake Shore Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, involved the validity of an act of the Legislature of Michigan requiring railroad companies to keep for sale 1,000-mile tickets at specified rates, less than the regular rates, to be issued in the name of the purchaser and the members of his family, and to be good for use for two years from the date of sale. The court said: “If the Legislature can interfere by directing the sale of tickets at less than the general established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the Legislature, it may lower them, provided it does not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the Legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the Legislature cannot thus interfere with the conduct of the affairs of corporations.”

The statute in question does not mention any consideration for the free transportation to the stock shipper or his employee to the point of destination and return other than “the price paid for said car”; such price or compensation for said car being prescribed and limited by section 1194, Rev. St. 1899 (Ann. St. 1906, p. 1005). If the purpose of the Legislature in requiring the railroad company to give free transportation to the shipper of live stock or his employee was to enable the shipper or his employee, free of charge, to accompany and care for the stock, the statute does not so state; nor does it impose upon the shipper the duty of caring for the stock, such duty now, as always, resting upon the carrier, and, if he neglects it, and by reason of such neglect the stock be injured, the carrier will be responsible to the shipper in damages, although the shipper be on the same train with the stock at the time such injury occurs. The statute does not require the shipper to accompany the stock, and, if the intention of the Legislature in enacting such law was that the shipper should accompany and care for the stock, it should so have provided, and, in consideration of the free transportation to the shipper, have to some extent absolved the carrier from the duty and responsibility of caring for the stock now resting upon it. Since it cannot be assumed that the usual price paid per car for the ship-

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ment of live stock is excessive to the extent of one passenger fare to and from the point designated in the bill of lading, the free transportation must be regarded as a gratuity, or rather a discrimination in favor of the shipper of live stock by the car load, as against the shipper of other classes of freight, by the car load, and as such it is as unjust to the latter as it is to the railroad company. It is clear that such legislation is "so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the fourteenth amendment." *Atlantic C. L. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 594 (51 L. Ed. 933). In that case it is said: "Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve, for a wholly inadequate consideration, a class or classes selected for legislative favor, even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier." Plaintiffs contend that the only maximum freight rate involved in this case is the rate on live stock in car load lots, and that the carrier is not required to render the service of transporting the shipper or his employee free, but that the carrier receives as its compensation for such service a part of the consideration paid for the car. We are unable to see the force of this argument. The law fixing the maximum freight rates on live stock contains no provision whatever for the transportation of the shipper free with the stock, and it cannot be that if the Legislature, in fixing the maximum rate, intended that the carrier should perform passenger service to be paid for in the transportation of the stock, it would not so provide in the act.

It is also said by plaintiffs that the subsequent enactment of section 1085, *supra*, "is in effect merely a reduction of the maximum rate on class H [live stock in car loads], in that it imposes on the carrier an additional service, while the rates prescribed remain as before." This is virtually admitting the unconstitutionality of the law, as already indicated. Besides, there is nothing disclosed by the record to justify such contention.

From the foregoing conclusions, it results that said section 1085, in so far as it requires railroad companies to furnish, free of charge, return transportation to shippers of stock by car load over the line of their road or roads to the point from which shipment is made, is in violation of the fourteenth amendment to the Constitution of the United States, and void, because it deprives the carrier of its property without due process of law, and is a denial of the equal protection of the law, in that it denies railroad companies the right to charge and exact payment of tolls or fares for the transportation of shippers of stock over their lines which

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they are allowed to charge other shippers for the same kind of service.

Our conclusion is that the judgment should be reversed and the proceedings dismissed. It is so ordered.

GANTT, C. J., and VALLIANT, FOX, and GRAVES, JJ., concur. LAMM, J., concurs in the result. WOODSON, J., dissents.

GINN v. PENNSYLVANIA R. Co.

(Supreme Court of Pennsylvania, April 20, 1908.)

[69 Atl. Rep. 992.]

Carriers—Injury to Passenger—Evidence.*—In an action by a passenger for personal injuries, plaintiff must show that the injuries complained of resulted from breaking of machinery, collision, derailment, or something unsafe in the conduct of the business or the appliances.

Same—Evidence.—A passenger on a train, while sitting at a window, was injured by a missile, the nature of which was unknown. There was nothing to connect the accident with a defect in any of the appliances or with negligence of the company. Held, that he could not recover.

Same.—Where the only evidence as to the cause of an accident to a passenger was that of plaintiff, who testified that, before the window at which he was sitting was struck by a missile, he heard two sharp reports, like the explosion of a torpedo, and that an engine on the track adjoining was opposite his window, a nonsuit was properly granted.

Appeal from Court of Common Pleas, Chester County.

Action by James N. Ginn against the Pennsylvania Railroad Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Plaintiff was a passenger on one of the defendant's trains from Philadelphia to Coatesville. While he was occupying a seat in a car next to a window, which was closed, the window pane was suddenly broken, and plaintiff's eyes were cut by particles of glass. Plaintiff testified that, immediately before the accident, he heard a train on the next track, and as he turned to look out the window, he heard two explosions, and an object flew up and hit the window, and that the object looked like a piece of tin, and resembled a torpedo.

*See second foot-note appended to *Chaffe v. Consolidated Ry. Co.* (Mass.), 27 R. R. R. 706, 50 Am. & Eng. R. Cas., N. S., 706; *O'Gara v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 333, 50 Am. & Eng. R. Cas., N. S., 333; foot-note appended to *Cincinnati Traction Co. v. Holzenkamp* (Ohio), 25 R. R. R. 553, 48 Am. & Eng. R. Cas., N. S., 553.

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Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Robert S. Gawthrop and Walter E. Greenwood, for appellant.
A. M. Holding and John J. Pinkerton, for appellee.

ELKIN, J. This appeal raises primarily the question of burden of proof. Under the facts proven at the trial was the burden of proof on the defendant company to show that the injury for which appellant claims damages was in no way the result of its negligence or was the burden on appellant to establish the negligence of the defendant company? In order to cast this burden on the defendant company, it was necessary for appellant to establish that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation. *Thomas v. Railroad Company*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416. This case is also authority for the rule that where a passenger on a railroad train, while sitting at the window of a car, was injured by a missile, the nature and origin of which were unknown, and there was nothing to connect the accident with a defect in any of the appliances of transportation, or any negligence on the part of the company or its employees, there can be no recovery against the company. These principles rule the present case. The evidence produced at the trial was not sufficient to establish the fact that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or anything improper or unsafe in the conduct of the business of the railroad or in the appliance of transportation. The evidence was not sufficient to establish the fact that the accident complained of was the result of the explosion of a torpedo. The case of *Ault v. Cowan*, 20 Pa. Super. Ct. 616, is in point. In that case the allegation was that the injury had been occasioned by the explosion of a torpedo, and it was held that there can be no recovery unless the plaintiff prove by affirmative evidence that the cause of the explosion was one for which defendant was liable. The only evidence in the present case on the question of the explosion of a torpedo was that of the plaintiff himself, who said that, immediately before the window was struck, he heard two sharp reports, like the explosion of a torpedo, and that an engine of a train on the track adjoining was just opposite his window, and from these facts the appellant contends that the jury should have been permitted to infer that the accident was occasioned by the explosion of a torpedo. We think the evidence was not sufficient for this purpose. At most it was a mere guess or conjecture, and something more definite must be established as the foundation of an action for damages.

Judgment affirmed.

HINCKLEY *v.* CITY OF DANBURY.

(Supreme Court of Errors of Connecticut, Aug. 3, 1908.)

[70 Atl. Rep. 590.]

Municipal Corporations—Defects in Streets—Action for Injuries—Negligence of Fellow Traveler.—In an action against a city for injuries, under the statute rendering a city liable to travelers injured by a defect in the highway, if the culpable negligence of a fellow traveler was the proximate cause of the injury plaintiff cannot recover.

Carriers—Passengers—Duties of Motorman to Passengers.*—As a representative of the street car company, the motorman owes to every passenger extraordinary care, and the highest reasonable degree of care consistent with the operation of the road is due from the company to any passenger who might be on the running board, and such passenger should be given warning by the motorman, or conductor, of possible danger from an obstruction which might injure him.

Master and Servant—Fellow Servants—Care Required to Each Other.—The conductor and motorman of a street car, being fellow servants, owed to each other a much less degree of care to prevent injury from obstruction in the street than they owe to passengers.

Municipal Corporations—Defects in Street—Action for Injuries—Proximate Cause.—A barrier was erected by the city in the street near the street car track to protect an excavation, the barrier extending close to the running board of the car as it passed, and the motorman on the first trip in the morning, noticing that it was near the running board, slowed up, plaintiff, the conductor, being then on the rear of the car, and on the return trip the motorman's attention was directed to a wagon on the street, and he did not see if any one was on the running board or given any warning of the obstruction, and plaintiff, who was then on the running board, was struck by the obstruction and injured. Held, in an action against the city for the injuries sustained, that the motorman's principal duty was to the passengers, and he was not bound to assume that the conductor did not observe the obvious danger of the obstruction, and hence his failure to warn the latter thereof was not negligence constituting the proximate cause of his injuries so as to bar a recovery.

*For the authorities in this series on the subject of the degree of care required of street railways as carriers of passengers, see first foot-note appended to *Chaffe v. Consolidated Ry. Co.* (Mass.), 27 R. R. 706, 50 Am. & Eng. R. Cas., N. S., 706; last foot-note appended to *Gregory v. Elmira, L. & R. Co.* (N. Y.), 27 R. R. 302, 50 Am. & Eng. R. Cas., N. S., 302.

For the authorities in this series on the subject of negligence in allowing passengers to expose themselves to danger, see foot-note appended to *Kruger v. Omaha, etc., Ry. Co.* (Neb.), 27 R. R. 260, 50 Am. & Eng. R. Cas., N. S., 260; last foot-note appended to *Lane v. Choctaw, etc., R. Co.* (Okl.), 26 R. R. 649, 49 Am. & Eng. R. Cas., N. S., 649.

Hinckley v. City of Danbury

Trial—Taking Question from Jury—Sufficiency of Evidence.—When the proof relied on to support the claim of liability is so weak that a verdict for claimant would be properly set aside, it is within the court's discretion to instruct the jury not to consider such evidence.

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Personal injury action by George W. Hinckley against the city of Danbury. From a judgment for plaintiff, defendant appeals. No error.

J. Moss Ives, for appellant.

John R. Booth, for appellee.

BALDWIN, C. J. Workmen employed by the defendant city, having made an excavation in one of its streets to connect private premises with its water main and sewer, erected, at the close of the day, a barrier for the protection of travelers, part of which came near a street railway track. The plaintiff was a conductor on the street car which made the first run past this point the next morning. As it approached the barrier on this trip, the motorman, thinking it was pretty close to the running board and might come over it, slowed up, but got by without hitting it. At this time there were no passengers on the car but the conductor, who, as he knew, was on the rear platform attending to his duties, and he did not speak to him of the incident or give him warning. On the return trip, as the car approached the barrier, the motorman forgot its existence, his attention being attracted by a team on the other side of the street, which he feared might be driven on the railway track, and did not look at the place of the excavation, nor turn to see if any one was on the running board, nor give any warning of danger to any one. The plaintiff, at this time, was on the running board, and his left leg was broken by coming in contact with the barrier. These were practically undisputed facts. The defendant claimed that the proximate cause of the injury was the negligence of the motorman in not giving some warning to those who were or might be on the running board; but the court charged the jury that no act of omission on his part had been shown which could prevent a recovery, if they found that the plaintiff was struck by the barrier while standing with both feet on the running board.

It is open to question whether the cause of action stated in the complaint is one upon the statute rendering municipal corporations liable to travelers injured by a defect in a highway. We shall assume, however, that it is, and therefore that, if the culpable negligence of one traveling with the plaintiff was a proximate cause of the injury, there is no cause of action. *Bartram v. Sharon*, 71 Conn. 686, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep 225; *Upton v. Windham*, 75 Conn. 288, 291, 53 Atl. 660,

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96 Am. St. Rep. 197. We shall assume also (without deciding) that the motorman was, as respects the plaintiff, a fellow traveler within the meaning of this rule.

The trial court, however, was right in the instructions given. The only facts in proof regarding the acts and omissions of the motorman are those which have been stated. These showed no failure to do his duty. Having exercised due caution in approaching the barrier on the trip out, and having found that the car cleared it, he was not bound, as respects the plaintiff, to keep his eye upon it or upon him on the return trip. It was a patent obstruction, which the conductor, as well as he, had an opportunity to see. As the representative of the street car company, the motorman owed to every passenger on the car extraordinary care. As to any of them who might be on the running board, the highest reasonable degree of care, vigilance, and forethought, which was consistent with the mode of conveyance and the practical operation of the road, was due from the company, and this required that they should be given warning of the possible danger, as they came near the barrier. A duty to give it may have rested upon him, if it were not given by the conductor; but the conductor and motorman were fellow servants, and owed each other a much less degree of care. The motorman was not bound to assume that the conductor had not observed or would not observe what was obvious to any one who looked about him. On the contrary, the slowing up of the empty car on its trip out, as it passed the barrier, would naturally have called the conductor's attention to the cause of the delay. The prime duty of the motorman on the trip back was to the passengers. He was right in keeping his eye on the team in front, so as to avoid a possible collision with it. That in so doing, and by reason of his safely passing the barrier a few minutes before, he forgot for the moment that it existed, and gave no warning to the plaintiff, could furnish no sufficient ground for an imputation of negligence, constituting a proximate cause of the injury to the latter.

When the proof relied on in support of a claim of liability is so weak that, if a verdict were rendered in favor of the claimant, it would be properly set aside by the court, it is within the discretion of the trial judge to instruct the jury to give such evidence no consideration. The case at bar fell within this rule.

There is no error. All concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. HARDEN.

(Supreme Court of Alabama, June 30, 1908.)

[47 So. Rep. 327.]

Appeal and Error—Rulings on Demurrer.—Where from the oral charge, copied in the bill of exceptions, it appeared that the jury were instructed that a certain count had been stricken on demurrer, that the judgment entry was silent as to the disposition made of the demurrer did not show prejudicial error.

Carriers—Injuries to Passenger—Pleading—Negligence.—Where, in an action for injuries to a passenger, the relation of passenger and carrier is averred, it was not essential that the negligence imputed to defendant's servants should be alleged to have been the result of acts within the scope of their duties.

Same.*—It is not negligence in all cases, as a matter of law, for a passenger to step off a moving car at right angles therewith, since the speed of the car must materially influence the determination of the question.

Same.*—In the absence of special circumstances, it is not negligence as a matter of law for a passenger to attempt to alight from a moving car.

Same.—Where the complaint, in an action for injuries to a passenger in alighting from a car, predicated a recovery on a jerk, resulting in the throwing of plaintiff to the ground, charges pretermittting consideration of this issue, and assuming that as a matter of law it is negligence to attempt to alight from a moving car, were properly refused.

Same—Instructions.—In an action for injuries to a passenger while alighting from a car through an alleged negligent jerk thereof, an instruction that, if plaintiff got off the car at a place where it was not usual to discharge passengers, it was not negligence for defendant's servants to cause the car to suddenly jerk, was properly refused, since, if not otherwise bad, it hypothesized the departure of plaintiff from the car, where as, if so, the jerk of the car could not be negligent under such circumstances.

Damages—Nominal Damages.—Where, in an action for personal injuries, there was no evidence on which to base a conclusion as to loss of earning capacity from the injury, the court should have charged that plaintiff could recover only nominal damages for loss of earning capacity.

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

*For the authorities in this series on the question whether it is contributory negligence to alight from a moving street car, see last foot-note appended to *Lexington Ry. Co. v. Herring* (Ky.), 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635.

Birmingham Ry., L. & P. Co. v. Harden

Action by Harvey Harden against the Birmingham Railway, Light & Power Company. Judgment for plaintiff and defendant appeals. Reversed and remanded.

The complaint was as follows: "Plaintiff claims of defendant corporation \$10,000 damages, for this, to wit: On or about July 26, 1903, plaintiff was a passenger on an electric car operated by the defendant, a corporation for the public carriage of passengers; that plaintiff was in the act of alighting from one of the passenger cars operated by the defendant at a point where said car was stopped for passengers to alight [naming the place], when the servants and agents of defendant in charge of the car negligently permitted or caused said car to suddenly start or jerk, and as a proximate consequence of said negligence plaintiff was thrown down on the ground, etc. [Here follows the allegation of special damages suffered.] * * * (3) Plaintiff claims of defendant \$10,000 damages, for that heretofore, on, to wit, July 26, 1907, plaintiff was received by defendant as a passenger on one of the cars operated by defendant for the public carriage of passengers, and while plaintiff was such passenger the defendant's agents or servants negligently caused or allowed the said car to suddenly start or jerk, thereby throwing plaintiff to the ground, injuring him," etc.

Demurrers were interposed to the first count as follows: "It does not appear therefrom that said car was stopped for the purpose of allowing plaintiff or other passengers to alight therefrom at the time plaintiff was in the act of alighting therefrom. (5) For aught that appears therefrom, plaintiff was in the act of alighting from said car while same was in motion, and at a place where it was not intended that passengers should alight from said car. The facts averred therein do not show that it was negligence to permit said car to suddenly start or jerk. It does not appear therefrom that the agents or servants of defendant were then and there acting within the line and scope of their employment." The same grounds were assigned to count 3. The pleas were the general issue and contributory negligence in negligently alighting or attempting to alight from the said car while the same was in motion.

The following charges were refused to the defendant: "(1) If the jury believe the evidence in this case, they cannot find from it that the witness Forshee was guilty of negligence." (2) Affirmative charge. "(3) If the jury believe from the evidence that plaintiff was injured while getting off defendant's car while it was moving, that he stepped off it at right angles and straight out from the car, and that his doing so proximately contributed to his injury, the jury must find for the defendant. (4) If the jury believe from the evidence that plaintiff was injured in alighting from defendant's car after it had started from its usual stopping place to take on and let off passengers, and while it was

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moving, the jury must find for defendant. (5) If the jury find for plaintiff, they are not authorized from the evidence to award him more than nominal damages to compensate him for any loss of earning capacity which the jury may believe from the evidence was a proximate result of the injury. (5) If the jury believe from the evidence that plaintiff was injured in alighting from defendant's car after it had started from the usual stopping place to take on and let off passengers, and while it was moving, and that there was no sudden or unusual jerk at the time he was alighting, the jury must find for defendant. (7) If the jury believe from the evidence that the plaintiff got off the car at a place where it was not usual for it to receive or discharge passengers, and while the car was moving, then defendant would not be liable to plaintiff for the running of its car with a sudden or unusual jerk at such place. (8) If the jury believe from the evidence that plaintiff got off the car at a place where it was not usual to take on and discharge passengers, then it is not negligence by which plaintiff can complain in this action for the defendant's conductor or motorman to cause its car to suddenly or unusually jerk, unless the jury also find from the evidence that the conductor or motorman knew when the car was started that plaintiff or some other passenger was in a position of peril from the starting of the car with such a jerk."

Tillman, Grubb, Bradley & Morrow, for appellant.

M. L. Ward and *Robert M. Bell*, for appellee.

MCCLELLAN, J. While the judgment entry is silent in respect of the disposition made of the demurrer to the second count, which imputed wantonness, etc., to servants or agents of the defendant, yet, from the oral charge of the court, copied in the bill of exceptions, it appears that the jury was instructed that the second count had been stricken on demurrer. This excluded the count from the jury's consideration, and no prejudicial error could have resulted to the appellant. The count was defective as charging wantonness, etc.

The court below, in its oral charge, thus correctly summarized the negligence relied on for a recovery by the plaintiff, who was averred to be a passenger: "In the first count he says he was hurt while in the act of alighting from a car; that while it was standing still it suddenly started and he was thrown down. * * * In the third count he alleges that he was hurt while a passenger, and that by a sudden jerk or jar he was thrown off and hurt." These counts were not subject to the demurrers. The relation of passenger and carrier being averred, it was not essential that the negligence imputed to the servants or agents of the carrier should be alleged to have been the result of acts within the scope of the duties of the charged servants or agents. *B. R. & E. Co. v. Mason*, 137 Ala. 342, 34 South. 207.

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Since it cannot be pronounced negligence in all cases as matter of law for a passenger to step off of a car at right angles therewith, charge 3 was properly refused to defendant. The speed of the running car must materially influence the determination of that inquiry. Ordinarily, if the car is barely moving, yet in motion, the speed thereof, supplying momentum to the passenger's body, may not be sufficient to overcome the equilibrium of the alighting passenger. If the passenger is feeble, incumbered, or crippled, of course, the resistance to maintain an equilibrium against such momentum would be plainly less, and a fall more probable of result.

Charge 1, declaring that under the evidence in the cause Forshee, the conductor on the trailer, was not guilty of negligence, was well refused. Forshee testified that he gave the signal to Brooks, conductor on the motor car, and he in turn gave the motorman a signal, to start. The duty of the defendant to observe the proper care for the safety of the plaintiff passenger did not wholly devolve on Brooks. Forshee was likewise bound to the observance of that care. It was open to the jury to find, from the evidence, that the starting of the car, as averred, was induced by the negligence of Forshee; an inquiry denied if charge 1 had been given.

Charges 4, 6, and 7 were properly refused to the defendant. These charges assume that, as a matter of law, it is negligence to attempt to alight from a moving car, whereas such is not the case, in the absence of special circumstances. *Hunter v. L. & N. R. R. (Ala.)*, 43 South. 802, 9 L. R. A. (N. S.) 848. Besides, the third count predicated a recovery upon a jerk or jar, resulting in the throwing of the plaintiff passenger to the ground, injuring him. These charges utterly pretermitt consideration of this issue raised by the pleadings.

Charge 8 was properly refused. If not otherwise bad, it hypothesizes the departure of the plaintiff from the car, whereas, if so, the jerk of the car could not be negligent under such circumstances.

We must reverse the judgment for the refusal of charge 5. In the oral charge of the court the jury was instructed that in "addition to that [other elements of damages, we explain] his disability to earn money and loss of time" were considerable, in arriving at the quantum of the damages, if they found for the plaintiff. In order to warrant a recovery of damages for loss of earning capacity resultant from the injury suffered, some evidence of the earning capacity before and after the injury must be given the jury. 4 Suth. on Damages (3d Ed.) § 1249, and authorities in notes. In other words, some data must be afforded the jury upon which to base a conclusion as to the loss of earning capacity in consequence of the injury. There was an entire absence of such evidence in this case, leaving the inquiry wholly

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subject to speculation on the part of the jury, and the court should have given the charge mentioned, since it correctly stated that on the evidence in the case, only nominal damages for the loss of earning capacity were properly recoverable.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

MITTLEMAN v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania, May 25, 1903.)

[70 Atl. Rep. 828.]

Carriers—Street Railroads—Duties of Conductor.—The conductor of a street car must control the operation of the car, and enforce the rules of the company as far as they affect the transportation of passengers.

Same—Duty of Passenger—Dangerous Position.—A passenger on a street car should take the place on the car assigned to him by the conductor, unless the danger in so doing is so apparent that a reasonably prudent person would not assume it.

Same—Negligence of Passenger.*—A passenger with numerous bundles attempted to enter an open summer car, and the conductor, after accepting his fare, directed him to occupy the platform. Held, that the passenger, in following the directions of the conductor, was not guilty of negligence as a matter of law.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Abraham Mittleman against the Philadelphia Rapid Transit Company. From an order refusing to take off a non-suit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Bernard Harris, for appellant.

Thomas Leaming and Sydney Young, for appellee.

MESTREZAT, J. This is an action of trespass to recover damages for injuries received under the following circumstances: On the morning of September 2, 1903, the plaintiff, with a companion,

*For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on the platform of a street car, see second foot-note appended to *Wagner v. Atlantic Coast Line R. Co.* (N. Car.), 28 R. R. R. 735, 51 Am. & Eng. R. Cas., N. S., 735; first foot-note appended to *Forbes v. Chicago, etc., Ry. Co.* (Iowa), 26 R. R. R. 714, 49 Am. & Eng. R. Cas., N. S., 714.

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went to Sixth and Pine streets, in the city of Philadelphia, to board a street car. The plaintiff is a paper hanger and painter, and had with him on this occasion a bundle of paper, a bucket of paste, a satchel, and a small stepladder. He and his companion desired to go west on a Pine street electric car. He testifies: "A. When I approached the car with the intention of boarding it, I approached it from the back near the conductor, and I attempted to board the car, and he said: 'Go to the front.' Q. Did you go to the front? A. Yes, sir. Q. You boarded the car in front? A. Yes, sir; in front. Q. Where did you remain after the car started? A. Near the motorman. Q. On the platform? A. On the platform." The car was an open summer car with transverse seats extending the entire width of the car, and with no openings from the platform into the body of the car. When it reached Sixth street, it collided with another car of the defendant company passing south on that street, and in the collision the plaintiff was seriously injured. The accident occurred about 7:30 o'clock in the morning. At the close of the plaintiff's testimony, the trial judge granted a nonsuit, giving as a reason therefor the following: "We simply have the case of a conductor saying to a passenger when he attempts to enter the rear of the car, 'Go forward,' and that passenger going forward to the very extreme front of the car, to wit, the front platform, and placing himself in that which has been decided by our courts to be a position of danger, and a position where, if an accident happens to him, he is debarred from recovering." The court in banc refused to take off the nonsuit, holding that the plaintiff in occupying a position on the platform was guilty of negligence per se. The opinion says: "It was a mere direction to him [plaintiff] to 'go to the front,' and, even if it be assumed that this was a direction to him to go to the front platform, as there was no constraint or compulsion, it was not a sufficient excuse for him to place himself in and remain in a position of danger."

We have repeatedly held that it is negligence per se for a passenger to voluntarily take a position on the platform of an electric street car when there are vacant seats in the body of the car. The body of the car, as is well understood, is the place prepared for and assigned to the passenger for transportation, and it is his duty to enter and remain there until he arrives at his destination. If he fails to observe this duty and voluntarily places himself on the platform or on the running board of the car, positions not intended to be occupied by a passenger, and which are more or less dangerous, he must assume the risk incident to such a place. But there are exceptions to this rule. Special reasons may obtain which justify a passenger in occupying a position on the platform while a car is in motion. If, as sometimes occurs, a seat is placed on one or both platforms of an open summer car, it is a sufficient reason for a passenger occupying the seat; and in doing so

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he is not guilty of negligent conduct. The act of the carrier company in placing the seat on the platform is an implied invitation to the passenger to use it, and estops the carrier from alleging that it is a place of danger to be avoided by the passenger. Where a passenger enters a car, and by reason of its overcrowded condition there is no vacant space in the body of it, he may occupy the platform with the acquiescence and knowledge of the conductor. *McCaw v. Union Traction Co.*, 205 Pa. 271, 54 Atl. 893. Such conduct does not convict him of negligence per se. His action is justified by the necessities of the case, and, by accepting his fare and permitting him to occupy the position, the conductor tacitly invites him to stand on the platform. These and other exceptions to the general rule that a passenger must not occupy the platform of a street car are recognized not only in our own, but in other, jurisdictions.

Turning now to the case in hand, we are clearly of the opinion that the facts disclosed by the testimony make it an exception to the general rule that a passenger on an electric street railway is guilty of negligence per se if he occupies a position on the platform of a moving car. The trial judge, as well as the court in banc, evidently misapprehended the facts of this case, and the inferences to be drawn from them. When the plaintiff approached the car to enter it, the conductor did not simply direct him to "go forward," thereby intending that he should take a seat in the front part of the car. So far as the evidence discloses, there is no reason why the plaintiff should not have been seated in the rear as well as the front of the car. There were vacant seats in both the rear and the front, and there is nothing in the case to show that the conductor could have had any reason for assigning the plaintiff a seat in the front rather than the rear of the car. On the other hand, a jury would have been fully justified, and it was for the jury, in finding that the direction to the plaintiff was to go to the front platform and occupy it with his incumbrances until he reached his destination. The plaintiff attempted to board the car and take a seat in the rear. When he did so, the conductor said to him: "Go to the front." As we have said, there is no reason appearing in the case why, if the plaintiff was to be permitted to enter the body of the car at all, he should not have done so then and have occupied a seat in the rear of the car. The plaintiff was carrying several articles which might have been objectionable to other passengers, and would certainly have obstructed ingress and egress to and from the body of the car, and the reasonable inference is that the command or direction of the conductor was that the plaintiff should enter the front platform and occupy it. This is also manifest and conclusively shown when we consider that the plaintiff frequently used the cars on this street with the same incumbrances he had on this occasion, and was always, as testified by him, told when he would attempt to

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enter the inside or body of the car: "You can't go there because there are passengers there. The seats are for passengers. You go with your bundles to the front of the car." We therefore have the case where a passenger laden with numerous bundles attempts to enter the body of an open summer car, and is directed to occupy the platform by the conductor who accepts fare from the passenger for his transportation. Under such circumstances, the court cannot declare as a matter of law that the passenger is guilty of negligence per se in occupying the position.

In *Duggan v. Baltimore & Ohio Railroad Company*, 159 Pa. 248, 254, 28 Atl. 182, 186, 39 Am. St. Rep. 672, the present chief justice delivering the opinion of the court said: "The conductor has general power and control over the train and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of trainmen, and of passengers willing to assist, for these purposes." The conductor of an electric street car is invested with a like authority. It is his duty to control the operation of the car, to protect and regulate the seating of the passengers, and to enforce the rules and regulations of the company affecting the transportation of the passengers. He is the representative and acts for the company in transporting the passengers. It is the duty of the passenger to submit to the authority of the conductor and to observe such reasonable directions as he may give. *O'Donnell v. Allegheny Valley Railroad Co.*, 59 Pa. 239, 98 Am. Dec. 336. This is necessary for the safe transportation of all the passengers aboard the car. A passenger would not be justified in obeying the instructions of a conductor to occupy a place on the car which was imminently or manifestly dangerous, but he should take the place on the car assigned him by the conductor, unless the danger is so imminent or apparent that a reasonably prudent man would not assume it.

Applying these principles to the case under consideration, we think that the conductor had the authority to direct the passenger to occupy the platform. It was within the powers conferred upon him by the company. The place assigned to the passenger, while not regarded as safe as the body of the car, yet it is so frequently used by passengers that it cannot be regarded as imminently dangerous. It is common knowledge that in a city where the travel on electric street cars is very heavy both platforms of the cars are constantly occupied by passengers with the knowledge and assent of the conductor, and that he collects the fares for their transportation. This is so well known that it must be taken to be within the knowledge of the company and done with their approval. Therefore, the conductor having the authority to require the plaintiff to occupy the platform and the plaintiff having done so in obedience to the direction of the conductor, the plaintiff was not guilty of negligence as a matter of

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law, to be declared by the court, in standing on the platform while the car was in motion. The case should have been submitted to the jury to determine the question of the plaintiff's negligence. If the jury found that the plaintiff when attempting to board the body of the street car was directed by the conductor to occupy the platform, and that in pursuance of such instructions from the conductor he did take his place on the platform, he is relieved from the charge of negligence. In other words, the plaintiff was not guilty of negligence per se in standing on the platform under the circumstances.

We are all of the opinion that the nonsuit was improperly granted, and therefore the second assignment of error is sustained, and the judgment is reversed, with a procedendo.

ILLINOIS CENT R. CO. v. REID.

(Supreme Court of Mississippi, April 27, 1908.)

[46 So. Rép. 146.]

Carriers—Ejection of Passenger—Punitive Damages.*—A passenger may recover punitive damages for ejection from a railway train at the last stop before reaching his destination, which was not a regular stop, where he acted in good faith under a special contract made by the carrier's agent entitling him to have the train stop at his destination, and the carrier's employees conformed to the contract until the last conductor threw the tickets in the passenger's lap, after having taken them up, telling him he must alight, and refused to listen to any explanation, saying, "I have heard that before," and where a trainmaster who was on the train refused to have the train stopped at the passenger's destination, though authorized to do so; it appearing that the train had been frequently stopped there, with and without orders, to discharge passengers.

Mayes, J., dissenting.

Appeal from Circuit Court, Pike County, M. H. Wilkinson, Judge.

Action by E. W. Reid against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for \$1,500 punitive and \$100 actual damages for being ejected from the train of the defendant railroad company. The jury assessed damages at the sum of \$438.91, and a judg-

*See second foot-note appended to *Birmingham Ry., etc., Co. v. Lee* (Ala.), 28 R. R. R. 618, 51 Am. & Eng. R. Cas., N. S., 618, where all the preceding authorities in this series on the subject are collected.

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ment was rendered accordingly, from which the defendant appeals.

Maycs & Longstreet and *R. N. & H. B. Miller*, for appellant.
Green & Green, for appellee.

WHITFIELD, C. J. The only question in this case is as to the right of the appellee to recover punitive damages. The judgment in the court below was for \$438.91, manifestly a judgment for punitive damages. The case in brief is this: E. W. Reid, desiring to go with his wife and children from Magnolia, Miss., to the World's Fair at St. Louis, Mo., in September, 1904, went to the ticket agent at Magnolia to purchase a ticket to St. Louis and return—a special excursion ticket calling for continuous passage. The return portion of this ticket was to be signed by him before the agent of the railroad company in St. Louis, according to the custom in such cases. When he purchased the ticket from Mr. Groce, the ticket agent of the appellant at Magnolia, Mr. Groce asked him whether he wanted No. 2—that is, the fast train going north—to stop for him, and Mr. Reid told him he did, and Reid asked the ticket agent, while purchasing the ticket, whether No. 3 would stop for him on his return trip, and the agent said in substance that it would. Mr. Reid's testimony, to be exact, is as follows: "When I bought the ticket, he [i. e., Groce] asked me if I wanted No. 2 to stop and I told him that I did; and after I signed the ticket I said: 'No. 3 will stop for me coming back, will it?' And he said, 'Yes.'" Reid further testifies that he always understood that No. 2, when going north, stopped for any passenger north of Grenada, Miss. Acting on the faith of this contract made with this ticket agent, Reid purchased a special excursion ticket and went with his family to St. Louis. When he got ready to come back, he says that he went to the ticket office at St. Louis, and signed his ticket in the presence of the agent, and bought his Pullman berths to Magnolia. He states that the ticket agent of the appellant company at this uptown office asked him for his railroad ticket when he bought his berths, and directed him to sign the return portion of the ticket, which he did in the agent's presence, and the agent witnessed it and stamped it—all as customary in such cases. He further says that he told this ticket agent of the train he wished to use this ticket on, in order to get berths in the Pullman car on that train, he wished to use his ticket on No. 3, the fast train going south by Magnolia on the Illinois Central Railroad. He further testifies that in St. Louis he presented his tickets, railroad and Pullman, at the gate of the Union Depot, and the employee whose business it was to attend to that matter asked where the tickets took him to, and he told him Magnolia, Miss., and the employee opened the gate and he walked in, having shown the tickets to this gateman, and that this gateman let him enter and board No. 3. He

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further testifies that after he boarded the train the conductor took up his railroad tickets and his sleeping car tickets, as is usually done in such cases, and that he then, with his family, continued without interruption on his journey until he got near to McComb City, about seven miles north of Magnolia, his destination.

Up to this point it will be seen that every official of the appellant charged with the duty of selling the ticket in the first place, and of accepting and stamping and witnessing the return portion of the ticket in the second place, and the gateman on guard at the Union Depot in the third place, and the conductor on train No. 3 in the fourth place, each and all acted in strict conformity with the special contract made between the appellee and the ticket agent who sold him the excursion ticket at Magnolia. The appellee acted manifestly on the faith of this contract, and expected to be put off in accordance with it on his return. He then proceeds to say that when he got near to McComb City on his return the conductor came through the car and handed him something, and that he asked the conductor what it was, and the conductor said it was his ticket. He then says: "I asked him what I wanted with it, and he said, 'You have got to get off at McComb City.' I told him I didn't think I did; that my ticket read to Magnolia. He said, 'I have heard that before,' and pitched the ticket in my lap and went on." He further states that the manner of the conductor was exceedingly discourteous; that he tried to tell him four or five times, and that the conductor refused absolutely and peremptorily to hear any explanation whatever; and that all this was witnessed by many other passengers. Further than this, it appears that Mr. Galvani, the trainmaster, was aboard the car, and Mr. Reid testified positively that he went to Galvani and appealed to him to get the train stopped, having been introduced to him by Mr. Thad Lampton; that he explained the facts and circumstances fully to Mr. Galvani, and told him that his ticket said take him to Magnolia, one continuous passage. He states that Galvani said that he (Galvani) did not have any authority in that line, and that he then asked him as a favor to him and to the ladies that were with him to have the train stopped at Magnolia and let them off, and that Galvani said that he did not have any authority in that line, and added, "Anyway I [Galvani] would be afraid to do it on account of the trouble you are having down there." This trouble, is very clearly appears, grew out of an effort on the part of the citizens of Magnolia, prominent among whom were the Lamptons, to force the through trains to stop at Magnolia. Mr. Galvani positively denies that Mr. Reid was introduced to him, or that any such conversation occurred. Manifestly the jury believed Reid. Mr. Reid further testifies that about this time, in the summer of 1904, Mr. Davis went to St. Louis and came back on this No. 3, and that Mr. Butler did the same thing, and that Mr. Middleton did

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the same thing, and that No. 3 stopped for all these gentlemen. On cross-examination Reid was pressed to say whether the conductor did not tell him that he could not stop the train unless he got an order from a higher official to stop, to which he answered: "No, sir; he didn't say that. I don't know that he got an order, or that he had to get an order."

Dr. Felder testifies that on his return from the World's Fair in 1904, on this same No. 3, it stopped for him to get off at Magnolia, and that this same trainmaster, Galvani, stopped it; himself giving the order to the conductor. On cross-examination it was attempted to show by this witness that the reason that Galvani stopped the train was that Felder's wife was suffering with a sick headache on that occasion; but Felder says this was not true, and that no such representation was made to Galvani. Galvani contradicts all this, too; but the jury accepted the statement of Felder. C. E. Davis testifies that on his return from the World's Fair in 1904, on the same kind of excursion ticket, the plaintiff had its train No. 3 stop for him at Magnolia. On cross-examination he says that the conductor did this on account of old acquaintanceship with the wife of the witness Davis, without any order of any kind. W. T. Butler testifies that on his return from the World's Fair in St. Louis in 1904, on exactly the same kind of excursion ticket the plaintiff had, this identical train No. 3 stopped for him at Magnolia, and that it was stopped without any request or order of any kind—stopped upon his simply telling the conductor that he wanted to get off at Magnolia. J. I. Middleton testifies that he returned from the World's Fair in the fall of 1904, and that the train was stopped for him to get off at Magnolia—this same No. 3—and that this was done twice in the fall of 1904. Willie Morse testifies that in the month of July, 1904, he got on this same train in St. Louis (No. 3); and, when asked on cross-examination whether he did not know that this train No. 3 never stopped at Magnolia except on special orders, said that he did not know about that—that he knew it stopped sometimes. West Elliot testifies, also, that he bought a ticket from New Orleans to Hot Springs at Magnolia, and went to the World's Fair in 1904, and that he came back on this same No. 3, and it stopped for him to get off at Magnolia, and that this was done on orders from a local attorney from Magnolia.

In addition to all this testimony, absolutely overwhelming, on the proposition that this special train, No. 3, did stop at Magnolia, on various occasions in that identical year and summer, and let passengers from the World's Fair, and other passengers, get off at Magnolia without any special order, and abundantly showing that Galvani had himself ordered this train stopped, in other cases than emergency cases, without any special order except his own order, the plaintiff introduced rule No. 403 of the appellant company, which is as follows: "Train Masters. 403. They

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will direct the movement of trains, make requisitions for coaches and regulate the runs of the crews." This rule, manifestly, authorized the train master to stop the train at Magnolia; there being nothing in the record to show to the contrary. The testimony of Galvani is in flat conflict with the testimony of other witnesses in the case with respect to what he did on various occasions, and with regard to his power to order the train stopped at Magnolia. The jury were certainly warranted, if they saw proper, in accepting the testimony of the other witnesses.

W. B. Groce, the ticket agent, and a witness for the defendant, testifies that Reid asked him if No. 3 would stop for him on his return, and that he told Reid that he did not suppose that he (Reid) would experience any trouble in getting it to stop; that it had stopped for other people on similar occasions. This is the positive testimony of the railroad ticket agent himself. Surely the jury were warranted in believing that this special contract was made, and that Reid boarded the train on the faith of this contract and this representation made by the ticket agent. Further than this Groce says, in answer to a question as to what he meant by other persons getting off on similar occasions, that he meant that the train generally stopped to let off Chicago and St. Louis passengers; that he did not know how often they had done this; that sometimes it would be once or twice a week; and this, too, was the positive testimony of a witness introduced by the railroad company, and that witness the ticket agent himself. How it is possible for the railroad company to contend, in the face of this testimony of its own ticket agent, that this special contract was not made, and that Reid did not board this train on the faith of this representation and special contract, it is certainly difficult to understand. Galvani in his testimony actually testifies that he did not remember anything about Reid's being introduced to him by Thad Lampton at all, nor about Reid's having any conversation whatever with him in respect to stopping train No. 3. Thad Lampton, in rebuttal, testified that he not only introduced Mr. Reid to Mr. Galvani on this train, but that he explained to Galvani that he (Reid) was associated with them (the Lamptons), and had charge of their business in Magnolia, and that Mr. Ed. Harlan, an engineer of the railroad living at McComb City, was with them when this occurred. Harlan was not introduced by the railroad company to contradict Lampton.

This is the case made by the testimony, except that there is a good deal of testimony, the object of which was to show that there was trouble and bad feeling between the Lamptons and the appellant company in respect to stopping this through train at Magnolia; that there had been litigation about this, and a contest before the railroad commission, etc. We say nothing as to all this. It seems to us to be utterly immaterial, in any view, for the proper decision of this cause. The question here is, not

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what state of feeling might exist between the Lamptons and the railroad company, but whether, in this particular case, the conduct of the conductor of this appellant company in this case, as made by all testimony which we have hereinbefore set out, was willful and wanton. It must be too clear for any further comment that the jury were abundantly warranted in believing that the special contract was made between Groce and Reid; that the ticket agent did agree with Reid that No. 3 should stop for him on his return; that Reid acted on the faith of this special contract and the faith of this representation of this duly constituted ticket agent; and that every official of this appellant company connected with his transportation, whether in Magnolia or in St. Louis, one and all, conformed to this contract thus made until the conductor came along at McComb City. Now the precise point, therefore, on which the defendant must stand, if it can stand at all, is that this conductor, Grant Lord, was not guilty of willful or wanton conduct in the expulsion of the appellee and his wife and children from this train; and the basis of all this reasoning is precisely the reasoning that has been three times discarded and repudiated by this court, to wit, that the conductor is not bound to listen to any explanation, and that he must go by the face of the ticket which is shown him, and that he is not required to listen to any statement setting forth special arrangements or special representations made by the duly authorized ticket agent at the time of the making of the special contract; and this is said to be because the conductor is bound by a rule of the company to act in this way, and to be governed, exclusively, by the face of a mere ticket, which may or may not be the whole contract.

We thought we had disposed of this with sufficient clearness and sufficient emphasis in *Railroad Co. v. Harper*, 83 Miss. 560. 35 South. 764. At page 570 of 83 Miss., page 767 of 35 South., we said: "It is idle to argue that the conductor, flatly refusing to listen to a perfectly reasonable explanation made by the woman, and putting her off, under the circumstances detailed in the evidence, at night, was not guilty of such intentional and oppressive wrong done as to warrant the imposition of punitive damages. It may as well be understood, once for all, that this court proposes to stand by the doctrine announced in the *Drummond* and *Riley* Cases as the just and true doctrine." We quoted in that case from the opinion of Mr. Justice Lamar in *New York, etc., R. R. Co. v. Winter's Administrator*, 143 U. S., at page 69 et seq., 12 Sup. Ct. at page 359, 36 L. Ed. 71, the following passage, which we again repeat, in the earnest hope that we may not be called upon to state it a third time: "The grounds upon which it is insisted that the evidence referred to was inadmissible are that the ticket itself, and the rules and regulations of the road with respect to stop-over checks, constitute the contract between

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the passenger and the road, and the only evidence of such contract, and that no representations made by a ticket seller could be received to vary or change the terms of such contract. This contention cannot be sustained, and is opposed to the authorities upon the subject. While it may be admitted, as a general rule, that the contract between the passenger and the railroad company is made up of the ticket which he purchases, and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket agent from whom he purchased his ticket, at the time of such purchase, is inadmissible, as going to make up the contract of carriage, and forming a part of it. In the first place, passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of conductors and other employees of railroad companies as to the internal affairs of the company, nor are they required to know them. *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859. In this case there is no evidence, as already stated, that notice or knowledge of the existence of the rules of the defendant company, or what they were, with respect to stop-over privileges, was brought home to the plaintiff at the time he purchased his ticket, or at any time thereafter. There was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanca after stopping off at the former place. It is shown by the evidence that Olean was a station at which stop-over privileges were allowed. Under such circumstances, it was entirely proper for the passenger to make inquiries of the ticket agent, and to rely upon what the latter told him with respect to his stopping over at Olean. *Hufford v. Grand Rapids & I. R. Co.*, *supra*; *Palmer v. Charlotte, C. & A. R. Co.*, 3 S. C. 580, 16 Am. Rep. 750; *Burnham v. Grand Trunk R. Co.*, 63 Me. 299, 18 Am. Rep. 220; *Murdock v. Boston & A. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Arnold v. Pennsylvania R. Co.*, 115 Pa. 136, 8 Atl. 213, 2 Am. St. Rep. 542."

We expressly held in the Harper Case that, if the company had any such rule, as here contended for, that the conductor must be governed by the face of the mere ticket alone, which may be but a part of the contract, then such regulation, not known to the passenger, is unreasonable and void, and we re-iterate again that declaration. What was the doctrine of the Riley Case, 68 Miss. 765, 9 South. 443, 13 L. R. A. 38, 24 Am. St. Rep. 309, and the Drummond Case, 73 Miss. 819, 20 South. 7, just referred to? This, as set forth at page 770 of 68 Miss., page 444 of 9 South. (13 L. R. A. 38, 24 Am. St. Rep. 309): "The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under

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the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts, and North Carolina it seems to have been decided that the ticket presented by the passenger is the only evidence of his right to travel upon the train which can be recognized by the conductor, and that if, by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed, and that he may not insist upon his right to travel on the wrong ticket or without it, when it has been taken up, and recover damages for the refusal of the carrier to permit him to do so, and that the carrier may lawfully eject him from its train, using no more force than is necessary for that purpose. On the other hand, it is held in Georgia and Indiana that the passenger is entitled to travel according to his real contract with the carrier, where the mistake in giving the proper ticket or in taking up a proper one held by the passenger is caused by the negligence of the servants of the carrier. *Railroad Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464." The court proceeded through Justice Cooper to comment and call attention to the fact that Michigan had practically overruled its former cases, and held with Georgia and Indiana, as shown by the case of *Hufford v. Railroad Co.*, 64 Mich. 634, 31 N. W. 544, 8 Am. St. Rep. 859, in which case an instruction was held to be erroneous which told the jury that if a ticket had been punched, indicating to the conductor by the punch mark that it had been used before, that would be evidence of infirmity in the ticket, and the plaintiff could not insist upon the ticket's being received. The Michigan Supreme Court said that instruction was erroneous, observing that: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent, who gave him the ticket he presented and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks." The court then referred to *Hutchinson on Carriers*, § 571, and the authorities cited in note 2, and in concluding the court said: "Where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse, at the peril of inviting an action for damages against his principal if the statement be true. A passenger, holding and attempting to use such ticket under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket read in the wrong direction, makes such a reasonable and probable showing as entitles him to be

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dealt with as a passenger, and therefore any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger." Note specially this last clause. In short, the Riley Case aligned this court, practically, with the Indiana and Georgia courts.

The only cases relied on by the learned counsel for the appellant are Railroad Co. v. Moore, 79 Miss. 766, 31 South. 436, and Vicksburg R. R., etc., Co. v. Marlett, 78 Miss. 872, 29 South. 62. A close examination of these cases will show that they have no sort of application to the case in hand. In the Marlett Case it appears from the opinion that no explanation was made or offered to be made to Conductor Dyer, who put Marlett off, of the fact that the previous conductor had failed to punch the ticket as the rule required. In the Moore Case the ticket had expired, as shown on its face, and in addition to this the ticket was unstamped. In other words, all the circumstances tended to contradict the proffered explanation of Moore as to how the mistake was made by the ticket agent at Oxford. In other words, the circumstances, instead of supporting the explanation, contradicted the explanation. That was the turning point of that case, and that fact was fully appreciated by the eminent counsel for the appellant in that case, who say in their brief, at page 770 of 79 Miss., page 436 of 31 South., as follows: "In the case at bar there is not one circumstance which tends in any way to corroborate the statement of the plaintiff. In fact, everything contradicted his statement. The ticket on its face had expired, and in addition to that it was unstamped—nothing to show that it came from the railroad office in a lawful way, or when. There was no exhibition of a check, as in the Holmes Case, 75 Miss. 371, 23 South. 187, and no exhibition of the stamp coupons, as in the Riley Case." Obviously, neither of these cases sheds any light on the point involved in this case. As stated at the outset, this case is controlled perfectly by the Harper Case, the Riley Case, and the Drummond Case. In the Drummond Case, 73 Miss. 818, 819, 20 South. 7, it is expressly stated by the court that "appellee made no explanation to the conductor of the circumstances connected with the purchase of the ticket or of the manner in which he received from the ticket agent the ticket he had not applied for. He only says he protested against his being required to occupy a seat in the second-class coach." In other words, the Drummond Case, in this respect, is exactly like the Marlett Case. But the court further held in the Drummond Case, at page 819 of 73 Miss., page 7 of 20 South., that the passenger's ticket is not, in all cases, conclusive evidence of his contract with the carrier, yet that it is sufficient evidence to justify a conductor in acting upon it, as showing the actual contract, in the absence

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of any reasonable statements made to him by the passenger that through fraud, mistake, or inadvertence it (the ticket) does not show the real contract. In other words, the court held, squarely and properly, that it is always competent to show, by reasonable explanations made to the conductor, that the ticket, through fraud, mistake, or inadvertence, does not set out the real contract.

We think the jury were well warranted in believing from the testimony in this case that Galvani had full power to stop this train without any higher authority, both from the testimony of the witnesses and from the rule No. 403; that this conductor should have listened to the explanation offered to be made by Mr. Reid, and, having heard it, should have stopped the train for the appellee according to the special contract. Instead of doing this, he pitches the ticket back in the lap of the appellee, tells him, "I have heard that before," the insultingly sinister implication involved in which is too obvious for comment, and willfully and wantonly and peremptorily refused to hear any explanation whatever. This is the willfulness, this is the wantonness—the refusal to hear any explanation whatever—which authorized the court to give the instruction regarding punitive damages.

We think the action of the court below was entirely correct in giving the instruction, and the judgment is affirmed.

CLEVELAND, C., C. & ST. L. RY. CO. v. LOUISVILLE TIN & STOVE CO.

(Court of Appeals of Kentucky, June 20, 1908.)

[111 S. W. Rep. 358.]

Carriers—Carriage of Goods—Liability of Carrier.*—A carrier is, with certain exceptions, an insurer of the goods intrusted to it for transportation, and it must provide cars which will protect the goods from the elements; and no defects therein will excuse it from liability on proof of injury to such goods.

Same.†—Ordinarily, to release a carrier from its liability for failure to furnish proper cars for the transportation of goods, there must be a distinct agreement by the shipper to assume the risk of the suffi-

*See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S. 176; second foot-note appended to Louisville & N. Ry. Co. v. Warfield & Lee (Ga.), 27 R. R. R. 345, 50 Am. & Eng. R. Cas., N. S. 345; Illinois Cent. R. Co. v. Davis & Levy (Miss.), 27 R. R. R. 109, 50 Am. & Eng. R. Cas., N. S., 109; Alabama, etc., R. Co. v. Elliott & Son (Ala.), 25 R. R. R. 656, 48 Am. & Eng. R. Cas., N. S., 656; Southern Ry. Co. v. Smith (Ky.), 25 R. R. R. 652, 48 Am. & Eng. R. Cas., N. S., 652.

†See extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384.

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ciency of the car furnished, or facts must be shown warranting the conclusion that he did not leave the selection of the car to the carrier, but assumed that matter himself.

Same—Duty of Shipper to Inspect Car.†—It is not the duty of a shipper to inspect a car furnished by a carrier, or to exercise care to know whether the car is in condition; but he may assume that the carrier would not have directed the placing of the goods in the car unless it was suitable.

Same—Connecting Carriers.—The fact that goods were loaded in cars without the knowledge or consent of the terminal carrier does not show that the initial carrier did not authorize it, and the terminal carrier must keep the goods safely after receiving them.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

“Not to be officially reported.”

Action by the Louisville Tin & Stove Company against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Humphrey & Humphrey and Alex P. Humphrey, Jr., for appellant.

James Quarles, for appellee.

HOBSON, J. The Louisville Tin & Stove Company brought this suit against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, alleging in its petition that on January 8, 1907, there was delivered to the defendant at Muncie, Ind., in good condition, a car load of oil cans which it agreed, for hire, safely to transport and deliver to the plaintiff in Louisville in good condition, but that, in violation of its agreement, the defendant loaded the cans in a defective and leaky car, by reason of which they were exposed to the elements, became wet and rusted, and thereby rendered unmarketable, to the plaintiff's damage in the sum of \$258. The defendant filed an answer to the petition in two paragraphs. The first paragraph was afterward withdrawn. The court sustained a demurrer to the second paragraph, and, there being a stipulation filed that the plaintiff's damages amounted to \$258, the court entered judgment in favor of the plaintiff for that sum, and the railroad company appeals.

The only question to be determined on the appeal is the sufficiency of the second paragraph of the answer to which the court sustained a demurrer. It is in these words: “Defendant, further

†See extensive note, 14 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419; Chicago, etc., Ry. Co. v. Morris (Wyo.), 28 R. R. R. 654, 51 Am. & Eng. R. Cas., N. S., 654; foot-note appended to Gulf, etc., Ry. Co. v. Wittnebert (Tex.), 28 R. R. R. 780, 51 Am. & Eng. R. Cas., N. S., 780.

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answering, states that the car mentioned in the petition had been filled with soda ash, a chemical, the action of which causes boards to shrink and metals to rust; that defendant had delivered said car to another railway company, to wit, the Muncie Belt Railway, and that the Muncie Belt Railway had delivered said car to the Muncie & Western Railway Company, which latter company had delivered said car to the factory of Ball Bros., near Muncie, Ind., upon a private switch of said Ball Bros.; that said Ball Bros. unloaded the soda ash from said car, and, without the knowledge or consent of defendant, placed the cans of which complaint is made in the petition in said car; that said car, having been loaded with soda ash, was not in fit condition to carry any sort of metal; that said Ball Bros. knew or by the exercise of reasonable care could have known that said car was in no condition for said shipment; that said car was delivered by said Ball Bros. to the Muncie & Western Railway and by the latter delivered to the Muncie Belt Railway, and by the Muncie Belt Railway delivered to the defendant; that the defendant had no power or right to inspect the contents of said car, or to inspect said car for any other purpose than to determine whether its running gear was in a sufficiently safe condition to carry over its road."

The railroad as a common carrier is an insurer of the goods intrusted to it for transportation, with certain exceptions not material here, and for its own protection must provide proper cars. The owner is not required to see that the cars are suitable or safe. He is not required to show negligence on the part of the railway company. All that he is required to show is the loss of his goods. No defect in the vehicles can excuse the common carrier from its common-law liability. *Hutchinson on Carriers*, § 497; *Elliott on Railroads*, § 1478. The answer does not deny the allegations of the petition as to the defectiveness of the car. It was the duty of the company to furnish a car which would protect the goods from the elements. The defense set up in answer is in effect that Ball Bros., by ordinary care, could have known that the car was defective; but it is not shown in the answer that Ball Bros. selected the car or assumed to be responsible for its condition. There are cases holding that where the shipper selects the car himself, trusting to his own judgment, the railroad company is not responsible if he selects a car that is insufficient; but that is not this case. It is not alleged that Ball Bros. selected the car, nor is it alleged that the car was not delivered to Ball Bros. for the purpose of the cans being loaded upon it. In *Harris v. Northern Railway Co.*, 20 N. Y. 232, the shipper selected the car himself. In *Densmore Commission Co. v. Duluth, etc., R. R. Co.*, 101 Wis. 563, 77 N. W. 904, the shipper fixed the car to suit himself. In *Frohlich Glass Co. v. Pennsylvania Co.*, 138 Mich. 116, 101 N. W. 223, 110 Am. St. Rep. 310, the shipper had

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supervision of the loading, with power to reject any car unfit for loading glass, and kept inspectors whose duty it was to select and inspect the cars before the glass was loaded. In these cases the railroad company was held not liable for any defect in the car. But ordinarily, to release the carrier from his common-law liability, there must be a distinct agreement by the plaintiff to assume the risk of the sufficiency of the car, or facts must be shown warranting the conclusion that he did not leave this matter for the carrier to determine, but assumed to determine it himself. *Pratt v. Railroad Co.*, 102 Mass. 557. It was not the duty of Ball Bros. to inspect the car or to exercise care to know whether it was in condition for the goods to be shipped in it; but they had a right to put the goods in the car assuming that the railroad company would not have directed this to be done, unless the car was suitable. It is not charged that Ball Bros. were not authorized to place the cans in the car. The fact that it was done without the defendant's knowledge or consent does not show that the initial carrier did not authorize it, and it was the duty of the defendant to keep the goods safely after it received them.

Judgment affirmed.

MAYOR, ETC., OF BOROUGH OF METUCHEN v. PENNSYLVANIA R. Co. et al.

(Court of Errors and Appeals of New Jersey, April 16, 1908.)

[69 Atl. Rep. 465.]

Railroads—Highway Crossings—Construction—Jurisdiction.—P. L. 1903, p. 660, § 29, providing that, when any railroad shall not properly construct crossings as required by law, the municipality may compel specific performance of the duties imposed by law on the company, and shall prescribe the crossings to be constructed or the repairs to be made, is constitutional, and confers jurisdiction in equity of a suit by the municipality to compel the repair of a highway under an overhead crossing.

Same—Change of Highways—Statutes.—P. L. 1868, p. 1037, § 1, authorizing certain railroad companies to shorten and straighten their lines, to cause the same to pass above or below any public highway or street crossing the same, and, if necessary, to change the location or grade so as to make the crossing more convenient, provided the location or grade be not changed without the concurrence of the common council of the city or borough, etc., did not give a township authority to grant any dispensation to a railroad company with reference to the change of the grade of a highway crossed by a railroad,

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nor entitle the railroad company to maintain pillars and abutments in the street underneath its tracks, and to narrow the crossing.

Same—Authority of Surveyors.—Such act did not authorize a majority of the highway surveyors to vacate in the interest of the railroad company any part of the street, or reduce its width.

Same—Change of Crossing.*—P. L. 1832, p. 104, § 20, constituting the charter of one of the constituent railroad companies forming defendant company, provided that it should be the duty of the company to construct and keep in repair bridges or passages over or under the railroad or roads where any public or other road should cross the same, so that the passage of carriages, horses, and cattle on the road should not be impeded thereby. Held that, where the company constructed and maintained a passage under its railroad at its intersection with the street of less capacity than the highway, the railroad company was under a continuing duty to enlarge the passageway as public accommodation required, until it should reach the full capacity of the highway.

Same—Necessity—Damages.—Evidence held insufficient to show a public necessity for the removal of columns and abutments supporting a railroad track from an underneath crossing and the widening of the passage to the full width of the street.

Same—Drainage.—Where a railroad company constructed an underneath crossing, and put in a drain to carry off the water accumulating on its right of way and to prevent the same from flowing into the street, and such drain became inadequate or defective, the railroad company was bound to reconstruct the same.

Same—Paving of Street.—Where a railroad company substituted an underneath passage for a grade crossing under a charter provision requiring it to keep such passages in repair so that the passage of carriages, horses, and cattle would not be impeded, and elected to construct such passage with a Belgian block pavement on the roadway, the railroad company was bound to keep the surface of the roadway in such passage in repair.

Appeals from Court of Chancery.

Suit by the mayor and common council of the borough of Metuchen against the Pennsylvania Railroad Company and others. From a decree (64 Atl. 484) in favor of complainant, for less than the relief demanded, both parties appeal. Reversed in part.

Alan H. Strong, for Pennsylvania R. Co. and others.

Charles L. Corbin and *George S. Silzer*, for borough of Metuchen.

GUMMERE, C. J. Prior to the year 1889 the railroad of the

*See extensive note appended to *Briden v. New York, etc., R. Co.* (R. I.), 23 R. R. R. 453, 46 Am. & Eng. R. Cas., N. S., 453.

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Pennsylvania Railroad Company, lessee of the United New Jersey Railroad & Canal Company, crossed Main street, in the Borough of Metuchen, at grade. For the better safeguarding of the public using this highway this grade crossing was in the year mentioned abolished by the lowering of the grade of Main street on each side of the railroad tracks, and the construction by the railroad company of a passageway under its railroad, connecting at each end with Main street at the lowered grade thereof. The width of Main street before this change was made was, and it still continues to be, 66 feet. The passageway under the railroad was constructed at a width of 45 feet, consisting of a roadway 25 feet wide paved with Belgian blocks, and a sidewalk 10 feet in width on each side thereof. The railroad where it crossed over the passageway was supported by iron columns which stood on the edge of either sidewalk, and the abutments and retaining walls of the embankment were on the exterior lines thereof. The drainage of the company's right of way to the east of this crossing point, for nearly a half mile, is toward the crossing, and for the purpose of taking care of the surface water which should flow into the passageway therefrom the company built a receiving basin, and laid a drain pipe from it, to connect with a brook about 1,000 feet to the west. The drain pipe, although when originally constructed carried off the water which came into the passageway, in times of heavy rain fails to do so at the present time, probably on account of some stoppage in the pipes, so that now the passageway is flooded during such periods to a sufficient extent to practically block traffic. In addition, the Belgian block pavement of the roadway in the passage has become so uneven and out of repair as to make travel over it dangerous. The bill in this case is filed by the borough to compel the defendant (1) to remove the pillars and abutments supporting its railroad from their present location, and to widen the passageway to the full width of Main street; (2) to reconstruct its drainage system in such a way that the water from its right of way shall no longer be discharged into the passageway in such quantity as to accumulate there and flood it; and (3) to put the pavement of the roadway in the underground passage in proper repair. Upon the hearing in the Court of Chancery it was decreed that the complainants were entitled to the relief sought so far as the widening of the passageway to 66 feet and the reconstruction of the defendant's drainage system were concerned, but that the defendant was not charged with the duty of repairing the pavement of the roadway. The defendant company appeals from so much of the decree as grants the complainants the relief stated; and the complainants appeal from that part of the decree which refuses them relief with regard to the repair of the roadway.

Taking up for consideration first the appeal of the railroad

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company, it is contended by it that the Court of Chancery has no jurisdiction over the subject-matter of the litigation. The same contention was made in the Court of Chancery, and it was there considered untenable. The grounds which led the learned Vice Chancellor to the conclusion that the matters involved in the litigation were cognizable in the Court of Chancery are fully set out in his opinion, and we concur in the views expressed by him upon this point, and in his conclusion. Upon the merits the Pennsylvania Railroad Company rested its defense against the claim that it should be compelled to remove its pillars and abutments, and open up the passageway to the full width of Main street, upon two statutory provisions. The first is contained in an act entitled "An act relative to the Delaware and Raritan Canal company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company," the three companies which were afterward consolidated into the United New Jersey Railroad & Canal Company (P. L. 1868, p. 1037), which authorized these companies to shorten and straighten any part of their railroad lines, and to cause the same to pass above or below any public highway or street crossing the same, and, if necessary, to change the location or grade of such highway or street so as to make the crossing more convenient, provided such change is concurred in by the common council of the city or borough, or a majority of the surveyors of the highway of any township, in which such change may be made. The second of these statutory provisions is contained in the charter of the New Jersey Railroad & Transportation Company, one of the constituent companies of the United New Jersey Railroad & Canal Company, and the original owner of this railroad, and is as follows: Section 20: "It shall be the duty of the said company to construct and to keep in repair good and sufficient bridges or passages over or under said railroad, or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on said road shall not be impeded thereby." P. L. 1832, p. 104. We agree with the conclusion expressed by the Vice Chancellor that under the facts proved before him, and which are fully set out in his opinion, the first of these statutory provisions affords no protection to the defendant company against the claim of the complainants, and for the reasons stated by him. But the conclusion reached by him that the charter provision above recited did not authorize the defendant company to carry Main street under its railroad through a passage narrower than the full width of the street, and affords no justification for the maintaining of the passage at its present width, is, we think, unsound. It may very well be that, when a railroad company builds its railroad over an existing public road so high above the level thereof as not to interfere

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with the public travel thereon, such a charter provision as that appealed to confers upon it no right to encroach upon the limits of such road with its abutments, or with supports for its tracks, but when the tracks of a railroad company have been laid across a public highway at grade, and increasing travel eventually requires the abandoning of the grade crossing for the better conserving of the safety of those using the highway, the right of the company under such a charter provision to construct a passageway under its railroad as it then exists of sufficient width and height to accommodate public travel, instead of lowering the grade of the highway, and carrying it in its full width under the railroad, is clear, for the imposition of the duty carries with it the power to perform that duty in exact accordance with its prescriptions. This, as we understand its opinion, was the view expressed by the Supreme Court in the case of *State v. Central Railroad Co.*, 32 N. J. Law, 220, and the soundness of that view has never since been questioned in any of our judicial decisions. The duty imposed is "to provide a substitute for that which is necessarily and lawfully taken away, and the law requires no more than that such substitute shall be sufficient to accommodate public travel at its location." *Township of Raritan v. Port Reading R. R. Co.*, 49 N. J. Eq. 11, 23 Atl. 127. No attempt was made on the part of the complainants to show that, when the grade crossing was abolished in 1889, the passageway then constructed by the railroad company under its railroad was not amply sufficient to accommodate public travel; that it was not so constructed that—in the language of the charter provision—the passage of carriages, horses, and cattle on said road would not be impeded thereby. We conclude, therefore, that at that time the construction now complained of was fully authorized by the charter provision referred to.

But the duty resting upon the defendant company of constructing and maintaining a good and sufficient passage under its railroad at its intersection with Main street is a continuing one, and, as that passage was not originally made of equal capacity with the highway, it must from time to time be enlarged by the company as public accommodation demands, until it shall reach the full capacity of the highway (*State v. Central R. R. Co.*, supra; *Township of Raritan v. Port Reading R. R. Co.*, supra); and it was considered by the Vice Chancellor, and is contended here on behalf of the borough, that the public travel upon Main street at the present time is of such volume as to require this passageway to be enlarged to the full width of the street. The only testimony upon that subject was given by one Eagan, who stated that, at the request of the mayor of the borough, he had upon a certain day during the hearing of the cause counted the number of persons and vehicles passing under the crossing between 6 o'clock in

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the morning and 7 o'clock in the evening, and that the number of foot passengers during the 13 hours was 1,459, the number of vehicles, exclusive of trolley cars (there is a single track trolley road running through Main street), was 394, and the number of trolley cars 4 each hour. The case shows that the defendant company's railroad station is located adjacent to this crossing, and it is fair to assume that the volume of travel through the passage is much heavier at the time of the arrival and departure of trains than at other times, and that it is not evenly distributed through the day at the rate of a vehicle every two minutes, and a foot passenger every half minute. But, even with this assumption, we are not able to perceive any ground for sustaining the conclusion that a roadway 25 feet wide, ample for the accommodation of three wagons abreast, with two sidewalks each 10 feet wide, is not fully sufficient for the accommodation of the travel at this point. When we remember that the roadway of Wall street, in the City of New York, one of the busiest thoroughfares in the world, is only 24 feet in width at its broadest point, viz., its junction with Broadway, and that the roadway of Chestnut street, the most important street in Philadelphia, a city of over a million inhabitants, is only 26 feet wide at its intersection with Broad street, the point of greatest traffic in all that immense city, we feel quite safe in saying that a roadway of practically the same width as that of those two great thoroughfares, supplemented by two sidewalks each 10 feet wide, is fully adequate to meet the requirements of the borough of Metuchen, with its population of 1907 (according to the state census of 1905) and of its vicinity. So much of the decree as requires the removal of the defendant company's abutments and embankments and the opening of the passageway to the width of Main street must be reversed. The portion of the decree which compels the defendant company to so reconstruct its drainage system that the water from its right of way shall not be discharged upon the street, and into the passageway, in such quantities as to interfere with public travel, we think should be affirmed; and for the reasons stated in the opinion of the learned Vice Chancellor.

Turning now to that portion of the decree appealed from by the borough, viz., the refusal to compel the defendant company to keep in repair the surface of the roadway under its right of way. We cannot concur in the view expressed by the Vice Chancellor that this duty of repair rests upon the borough authorities, and not upon the defendant company. We have pointed out that what was done in 1889 was not the depressing of the grade of Main street at the point of its intersection with the company's railroad, and the carrying of the street under the railroad at the altered grade, but the substitution by the defendant

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company at that point of a public way or passage under its railroad in the place thereof, and that this substitution was authorized by the power conferred upon the company by the twentieth section of the charter of the New Jersey Railroad & Transportation Company. This provision apparently leaves the size of the passage and the character of its construction to be determined by the judgment of the railroad company, with the single limitation that it shall fully accommodate public travel. The railroad company in the present instance elected to construct a passage with a Belgian block pavement upon the roadway thereof, and this pavement constituted an integral part of that passage. The charter provision of which the defendant company has availed itself requires the company "to keep in repair" such passages as it shall construct under its railroad, and that duty covers every part of such passageway. So much of the decree as relieves the defendant from the performance of that duty must be reversed.

STATE *ex rel.* NORTH COAST RY. v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, March 28, 1908.)

[94 Pac. Rep. 907.]

Eminent Domain—Compensation—Constitutional Provisions.—The constitutional provision that private property shall not be taken or damaged for public or private use without just compensation having been first made and paid into court for the owner applies to property owned by a railroad company, as well as to property owned by an individual.

Railroads—Maintenance—Crossing Other Railroads—Determination as to Expenses of Crossing.*—Where one railroad by condemnation proceedings sought to acquire the right to make a grade crossing over the tracks of another, it was proper in granting the right, to charge the cost of maintaining and operating the interlocking device required to be installed to the relator, defendant having the right to be made whole for all damages that directly ensue by reason of such crossing.

Same.—In such proceedings, it was proper to provide that the interlocking device directed to be installed and maintained should cover an additional track contemplated by defendant, if actually laid within a reasonable time, but not to provide that it should cover any and all additional tracks which defendant might desire to construct and operate in the future at the point of crossing, nor to confine relator's right to cross to a single track; it being best to leave future contingencies to future determination.

*See foot-note appended to Minneapolis, etc., Co. v. Cedar Rapids, etc., Ry. Co. (Iowa), 23 Am. & Eng. R. Cas., N. S., 152.

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Condemnation proceedings by the North Coast Railway Company to acquire a right to cross the right of way and track of the Northern Pacific Railway Company. From a decree granting the right on certain terms and conditions, plaintiff brings a writ of review. Decree modified, and, as modified, affirmed.

See 94 Pac. 112.

H. J. Snively, Danson & Williams, and Fred H. Moore, for petitioner.

Ira P. Englehart and B. S. Grosscup, for respondent.

FULLERTON, J. The relator is a railroad company authorized by its charter to construct, operate, and maintain railroads in this state and elsewhere, particularly from the city of Walla Walla to the city of Seattle, by way of the Yakima Valley. In the construction of its road it found it necessary to cross the right of way and track of the Northern Pacific Railway Company at a point in Yakima county, and, being unable to agree with that company as to the place and manner of crossing, brought condemnation proceedings in the court of that county to acquire the right so to cross. The trial court entered a decree granting the right, but annexed terms and conditions thereto which the relator conceived not to be in accordance with its rights in the premises, and it brought the proceedings into this court by a writ of review.

The evidence introduced at the hearing in the trial court is not in the record, and we are controlled as to the facts by the findings of the trial judge. Those material to the questions presented are in substance these: "That the said claimant, Northern Pacific Railway Company, has occupied the point where petitioner seeks to cross said railroad by a line of railroad for many years; that the point where petitioner seeks to cross the railroad track of said Northern Pacific Railway Company is in a level section of the country, and that said point is suitable for a grade crossing, the surrounding country for about two miles north of Parker Siding and for several miles south thereof being a comparatively level prairie; that a grade crossing of the two railroads is the natural crossing; that to require the two railroads to cross at separate grades it would be necessary for petitioner to construct an artificial fill or embankment extending from a point about two miles south of Parker Siding to a point about two miles north thereof, said fill or embankment ranging in height from zero where the grade stands at each end to about 25 feet at the point of crossing, thus causing what is known as an 'adverse grade'; that, if such an embankment were constructed on petitioner's line, it would be practically impossible for petitioner to maintain a station either at Parker Siding or between Parker Siding and Union Gap, or any place between Parker Siding and a point two miles south of said siding; that such an embankment would greatly inconvenience petitioner if it should desire to extend a branch

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over any place on the reservation lying west of said siding; that, if the two railroads cross at the same grade by installing and operating a suitable and proper interlocking and derailing device, the dangers of accidents, so far as the crossing is concerned, is very slight; that with such a device it is necessary for a train on one road to stop only when the crossing is being used by a train on the other road; that there are standard devices of this character in general use at crossings of this character; that it is necessary and proper that a standard interlocking device should be installed at such crossing for the safety of the public and the safe operation of the trains on both roads; that the cost of installing an interlocking plant at this point will be about \$7,500; that the annual cost of operating and maintaining said interlocking plant will amount to 5 per cent. upon the sum of \$75,000, from which the court finds that the value to the petitioner of constructing its roads so as to separate the grades of the two roads would be the sum of \$75,000, excluding the contingent and uncertain elements of damage, including danger and delay of operation; that it would cost to separate the grades at this point between the sum of \$175,000 and the sum of \$200,000; that the claimant, Northern Pacific Railway Company, has offered in open court, by due authority, to pay one-half of said cost over and above the sum of \$75,000, in order to avoid the dangers and delays incident to any grade crossing; that, the claimant, Northern Pacific Railway Company, acquired its right of way and constructed its road at the point of the proposed crossing prior to the year 1885, and now has the bona fide intention, within the near future, of double tracking its line of railroad at the point of the proposed crossing, and that such double tracking is a necessity. The claimant, Northern Pacific Railway Company, at said point, by reason of prior location and plan of increasing its trackage, has the prior right at said point, and should be permitted to construct without hindrance additional tracks. A grade crossing at said point without the protection of the standard interlocking plant would involve great danger to persons and property, and the situation is such that it will not be permitted." As conclusions of law from the foregoing facts, the court held that the relator was entitled to cross the defendant's track at grade; that an interlocking device was necessary and should be installed; that the relator should be charged, not only with the expense of installing the device, but also with its maintenance and operation; that the expense of such installation and maintenance should include any additional tracks the defendant, or its successors or assigns, should desire to construct and operate at the point of crossing; and that the right of the relator to cross the defendant's track be confined to a single track. A decree was entered accordingly. The errors assigned, while somewhat numerous, suggest but two

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principal questions: First, did the court err in charging the cost of maintaining and operating the interlocking device required to be installed to the relator; and, second, did the court err in requiring that the relator provide and maintain interlocking devices for all additional tracks that the defendant may construct in the future at the point of crossing, and in limiting the relator to a single track.

In regard to the first question, we think it must be answered in the negative. It is true that the right of one railroad to cross the right of way and track of another is granted in this state by both the Constitution and statute, and exists, perhaps, as a natural right independent of either, yet we think this does not argue against the right of the road whose right of way and track is crossed to be made whole for all damages that directly ensue by reason of such crossing. The constitutional provision that private property shall not be taken or damaged for public or private use without just compensation having been first made and paid into court for the owner applies to property owned by a railroad company, as well as to property owned by an individual. Although the property of a railroad company may be devoted to a public use, and be subject to control by the public authorities, the property itself is nevertheless private property. For injuries to it, for trespasses upon it, for its wrongful taking actions will lie at the suit of the railroad company to the same extent as will actions by a private person where wrongful assaults have been made upon his property. Nor is there any distinction in this respect between a railroad's right of way and its other property. It is all, even its franchise, subject to sale on execution. In fine, the property of a railroad company is but private property burdened with a public use. As was said by Mr. Justice McKenna, in *Western Union Tel. Co. v. Penn. R. R. Co. et al.*, 195 U. S. 540, 570, 25 Sup. Ct. 133, 141, 49 L. Ed. 312: "A railroad's right of way has * * * the substantiality of a fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power is * * * reasonable compensation to the owner of the property taken."

That the burden of maintaining an interlocking device at the point of crossing of these roads is an actual damage to the defendant company cannot be questioned. Indeed, the trial judge found, and that finding cannot be questioned here, that it would amount annually to so considerable a sum as 5 per centum on \$75,000. That it is the direct result of the relator's act in cross-

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ing the defendant's road is likewise beyond questioning. Why, then, should it not be charged to the company for whose benefit it is occasioned? It seems to us that the question admits of but one answer—it should be so charged. This question was before the Supreme Court of Minnesota in *Winona & S. W. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 50 Minn. 300, 52 N. W. 657. In prescribing the terms under which the second road might cross the first the trial court required that the latter should install and maintain at its own cost an interlocking device so as to enable trains to pass the crossing without stopping and without danger of collision. On appeal by the road desiring to make the crossing this order was held to be within the power of the trial court. On the question of cost the court said: "The purposes for which such requirements may be made reach beyond the mere construction of the crossing, the laying the rails across, and extend to its operation after the merely mechanical work of getting across is done, and for that reason the court may prescribe, not only what it may decide to be necessary in constructing the crossing to make it least injurious to the corporation whose track is crossed, but it may also prescribe that the condition which it may deem proper shall be maintained. Of course, where the action of the crossing corporation makes necessary the expense of doing what the court prescribes for the purpose of putting and keeping the crossing in proper condition so as to do least injury to the corporation whose track is crossed, the court may require it to bear such expense." In Montana in the well-considered case of *B. A. & P. Ry. v. M. U. Ry.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508, the court held it proper to provide that the expenses of a watchman found necessary to be stationed at the point of crossing another railroad track should be borne by the road desiring the right to cross. So in *F. & P. M. R. R. Co. v. D. & B. C. R. R. Co.*, 64 Mich. 350, 31 N. W. 281, it was held that the cost of maintaining signals, or a crossing system, as well as of a watchman, was a proper element to be considered by commissioners or a jury in awarding damages to a railroad company whose road is sought to be crossed by another railroad. See, also, *Hydell v. Railway*, 74 Ohio St. 138, 77 N. E. 1066; *M. & C. R. R. Co. v. B., S. & Tenn. River Ry. Co.*, 96 Ala. 571, 11 South. 642, 18 L. R. A. 166; *Toledo, A. A. & N. M. Ry. v. Det., L. & N. R. R.*, 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; *West Jersey, etc., R. R. Co. v. Atlantic City, etc., Trac. Co.*, 65 N. J. Eq. 613, 56 Atl. 890; *K. C. Rd. Co. v. Com'rs of Jackson Co.*, 45 Kan. 716, 26 Pac. 394. The relator placed its principal reliance upon the cases of *Railway v. Railway*, 30 Ohio St. 604, *Railroad Co. v. Railway Co.*, 123 Iowa, 543, 99 N. W. 181, and *Detroit, etc., Ry. v. Osborn*, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860. But these cases are founded upon statutes which expressly provide that the expense of main-

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taining the crossing devices shall be apportioned between the roads. Whether such a statute would or would not be in conformity with our Constitution we need not now inquire. But the fact that the cases were based on a statute deemed constitutional places them outside the question presented here.

In regard to the second question, we think the court should not have anticipated the future. Since it found that the defendant contemplated putting in an additional track in the near future to accommodate its already accumulated business, it was proper to provide that the interlocking device directed to be installed and maintained should cover the additional track should the same be actually laid within a reasonable time. But the order should not have included mere possibilities. It should not have included any and all additional tracks which the defendant might desire to construct and operate in the future at the point of crossing. It may be that changed conditions at the time the defendant desires to construct the additional tracks will render it inequitable that the relator provide and maintain the devices found necessary to safeguard the crossings, or it may be that the relator when it makes the defendant whole for the present damage has done its full duty, and from thence forth stands on an equal footing with the defendant, and that justice will require that the cost of maintenance of safeguards made necessary by the changed conditions shall be borne by both companies, or by that company for whose benefit it is installed: but these are questions not now necessary to decide. They are suggested merely to illustrate the point that future contingencies had best be left to future determination. For the same reason the order confining the relator's right to cross to a single track should be modified. If it wishes now to install a double track with proper interlocking devices at its own cost for installation and maintenance, it ought to be permitted to do so. Should it in the future desire to double its track, the necessity therefor ought to be left for determination at that time.

The cause is remanded, with instructions to modify the judgment in the particulars above indicated. In other respects it will stand affirmed. Neither party will recover costs.

MOUNT, RUDKIN, and DUNBAR, JJ., concur. HADLEY, C. J., and CROW, J., not sitting.

CITY OF ST. LOUIS, Appt., *v.* UNITED RAILWAYS COMPANY
and St. Louis Transit Company. (No. 193.)

CITY OF ST. LOUIS, Appt., *v.* ST. LOUIS & SUBURBAN RAILWAY
COMPANY. (No. 194.)

CITY OF ST. LOUIS, Appt., *v.* ST. LOUIS & MERAMEC RIVER
RAILROAD COMPANY. (No. 195.)

(Argued March 20, 23, 1908. Decided May 18, 1908.)

[28 Sup. Ct. Rep. 630.]

Constitutional Law—Impairing Contract Obligations—License Tax on Street Railways.—An inviolable contract between a municipality and street railway companies which will prevent the exaction of a license tax under an acknowledged power of the municipality is not created by ordinances passed in the exercise of authority to grant the use of the streets, under which the companies have agreed to pay certain sums for the use of such streets for a given period, where such ordinances do not expressly relinquish the right to exact license fees or taxes.

Appeals from the Circuit Court of the United States for the Eastern District of Missouri to review decrees enjoining, as impairing contract obligations, municipal ordinances imposing license taxes on street railway companies. Reversed.

The facts are stated in the opinion.

Messrs. William F. Woerner and Charles W. Bates, for appellant.

Mr. Henry S. Priest, for appellees.

MR. JUSTICE DAY delivered the opinion of the court:

These cases were submitted together and involve the effect of certain ordinances of the city of St. Louis, which are alleged to be binding contracts, protected by the Federal Constitution.

A bill was filed in the circuit court of the United States for the eastern district of Missouri by the United Railways Company of St. Louis and the St. Louis Transit Company, the former being the lessor and the latter the lessee of a large system of street railways in the city of St. Louis. The bill seeks to enjoin the enforcement of a certain ordinance, No. 21,087, in the city of St. Louis, passed March 25, 1903, alleging violation of the contract clause of the Constitution and of rights secured by the 14th Amendment. The case was tried upon the bill, answer, replication, and an agreed statement of facts.

The complainants are the owners of certain rights granted by ordinances to a number of street railway companies in the city of St. Louis, the assignors of the complainants. These ordinances are set out in the record and are quite numerous. Some of

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them cover quite extended terms, running as long as forty and fifty years. They purport on their face to grant to the railway companies named in the ordinances, their licensees, successors, and assigns, rights in certain streets "to operate, maintain, and construct,"—"to lay down, construct, operate, and maintain,"—"to reconstruct its tracks and maintain and operate its railway thereon." The grants in these ordinances are in consideration of certain undertakings and obligations stated therein on behalf of the railway companies, which are thus epitomized, in the opinion of the learned judge in the case in the circuit court: (1) To commence and complete the work of laying down the tracks and installing the road within certain specified periods. (2) To grade the streets from curb to curb. (3) To construct and keep in repair that portion of the street lying between the tracks and 12 inches outside thereof. (4) To cause cars to be run day and night at certain intervals named in the ordinances. (5) To pay certain stipulated sums of money, or certain percentages of the gross earnings of the several companies, to the city each year during the continuance of the privileges specified in the contract.

At the time these ordinances were passed there was in force in the state of Missouri a certain provision of the state Constitution, namely:

"No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained." [Art. 12, § 20.]

The city charter of St. Louis contains, among others, the following provisions:

Article 10.

Sec. 1. Authority of municipal assembly in reference to street railroads; may sell franchises or impose a *per capita* tax or a tax on gross receipts.—The municipal assembly shall have power by ordinance to determine all questions arising with reference to street railroads, in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder, or, as a consideration therefor, to impose a *per capita* tax on the passengers transported, or an annual tax on the gross receipts of such railroad, or on each car, and no street railroad shall hereafter be incorporated or built in the city of St. Louis except according to the above and other conditions of this charter, and in such manner and to such extent as may be provided by ordinance.

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There was also in force in the city charter of St. Louis, article 3, § 26, subd. 11, which empowers the city, through its mayor and municipal assembly:

“Eleventh.—To protect rights of city in corporations; grant, regulate, and repeal railway franchises; free passes on street railways prohibited.—To take all needful steps in and out of the state, to protect the rights of the city in any corporation in which the city may have acquired an interest; to have sole power and authority to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part, and to regulate and control the same as to their fares, hours, and frequency of trips and the repair of their tracks, and the kind of their rails and vehicles; but every right so granted shall cease, unless the work of construction shall be begun within one year from the granting of the right, and be continued to completion with all reasonable practical speed, and it shall be the cause of forfeiture of the rights and privileges derived from the city of any railroad company operating its road only within this city, which shall allow any person to ride or travel on its road gratuitously or for less than usual price of fare, unless such person be an officer or employee of such company.”

The 5th subdivision of § 26 of article 3, clause 5, confers upon the mayor and assembly the power to license, tax, and regulate certain occupations and kinds of business, vehicles, conveyances, etc., among others, street railway cars. As appears from the agreed statement of facts, at the time the ordinances granting rights to the street railways were passed there were sections of the municipal code of St. Louis (2134 et seq.) in force, requiring the street railway companies to pay to the city collector an annual license fee of \$25 for each and every car used by them in transporting passengers for hire in the city. These sections were passed under the power conferred to license, tax, and regulate occupations, vehicles, and street railway cars.

The ordinance which is the subject-matter of this controversy is No. 21,087, purporting to impose a tax equal to one mill for each pay passenger on each car, and purporting to be an amendment of the sections of the municipal code fixing the license tax at \$25 per car. It is stipulated in the agreed statement of facts that all the railway companies named in the complaint, including the United Railways Company and the St. Louis Transit Company, paid the annual license of \$25 per car until the going into effect of ordinance 21,087.

This case was decided by the learned judge of the circuit court upon the theory that the power of the city to give its consent to the use of the streets for the purpose of constructing and operating railroads, and the power to license street railway cars, were both exercised in the special ordinances in question, and that,

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in fixing the compensation to be paid by the railway companies, an irrevocable contract was made which prevented the city, during the terms of the ordinances, from imposing any license fee or tax for the operations of the cars; for, says the learned judge:

“There is neither statutory command nor any perceptible reason why both these powers should not be exercised in one and the same ordinance, and such, in my opinion, is the obvious purpose of the original ordinances granted to complainant’s assignors.

“The right ‘to construct and operate’ is conferred in terms admitting of no doubt. The license, which is essentially an occupation tax, is, in my opinion, also fixed in each of the ordinances. The several original ordinances or contracts clearly mean that the city exacted, among other things, certain quarterly or yearly payments of money to be made to it by the railroad companies as a consideration for the grant by it of the right to occupy and use its streets for the purpose of laying down, maintaining, and operating railroad tracks thereon. The law nowhere commands that the license fee, as authorized by the 5th subdivision in question, shall be for annual or other terminal occupation. And I perceive no reason why the city may not at the outset fix such a license for the full term of its grant. This is what I think it did in and by the terms and stipulations of the several ordinances in question.”

The theory, then, upon which the bill was framed and this case decided, was that the city, having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance of March 25, 1903, amending the municipal code in the manner already referred to. These sections of the municipal code, requiring the payment of the license fee, impose a tax, as the main purpose of their enactment is the raising of revenue. *St. Louis v. Spiegel*, 75 Mo. 145, 146.

The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a state or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can only follow when the state or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption. The section of the Missouri Constitution, and the laws to which we have referred, clearly show that while the franchise of the corporation essential to its existence is derived from the state, the city retains the control of its streets, and the use of them must be acquired from the municipal authorities upon terms and conditions which they shall fix. *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

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An examination of the cases in this court shows that it is not sufficient that a street railway company has agreed to pay for the privilege of using the streets for a given term, either in a lump sum, or by payments in instalments, or percentages of the receipts, to thereby conclude the municipality from exercising a statutory authority to impose license fees or taxes. This right still exists unless there is a distinct agreement, clearly expressed, that the sums to be paid are in lieu of all such exactions.

A leading case is *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406. In that case the city of New Orleans, on October 2, 1879, sold to the New Orleans City Railroad Company, assignor of the plaintiff in error, for the price of \$630,000, the right of way and franchises for running certain lines of railroad for carrying passengers within the city, for the term of twenty-five years, and the company agreed to construct its railroad, to keep the streets in repair, to comply with the regulations as to the style and running of cars, rates of fare, and motive power, and to annually pay into the city treasury, upon the assessed value of the road and fixtures, the annual tax levied upon the real estate, the value of the road and fixtures to be assessed by the usual mode of assessment; and the city bound itself not to grant, during the period for which the franchises were sold, a right of way to any other railroad company upon the streets where their right of way was sold, unless by mutual agreement between the city and the purchaser or purchasers of the franchises.

Afterwards, in the year 1887, under authority of a legislative act, the city imposed a license tax upon the business of carrying on, operating, and running a horse or steam road for the transportation of passengers within the limits of the city, payable annually, and based on the annual gross receipts; when the same exceeded \$500,000, the amount to be \$2,500. The railroad company admitted its receipts exceeded that sum, and claimed the protection of the Constitution of the United States for its franchise contract exempting to January 1, 1906, as above set forth.

This would seem to be as strong a case for the exemption from the license tax as could be made, short of a specific agreement binding the city not to exercise its power in that direction.

This court affirmed the judgment of the supreme court of Louisiana, denying the contention of the railroad company (40 La. Ann. 587, 4 So. 512), and Mr. Justice Gray, speaking for the court, said:

“Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 668, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625, and cases cited. Assuming, without deciding, that the city

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of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the state, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property.

"In *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529, upon which the plaintiff in error much relied, the only point decided was that an act of the legislature, continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the state was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 386, 401, 402, 14 L. ed. 977, 984, 990, 991; *New York v. Tax & A. Comrs.* 4 Wall. 244, 259, 18 L. ed. 344, 350, *Jefferson Branch Bank v. Skelly*, 1 Black, 436-446, 17 L. ed. 173-178; *Farrington v. Tennessee*, 95 U. S. 679, 690, 694, 24 L. ed. 558, 561, 562; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 328, 29 L. ed. 636, 643, 6 Sup. Ct. Rep. 334, 338, 1191.

"The case at bar cannot be distinguished from that of *Memphis Gaslight Co. v. Taxing District*, in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gasworks and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: 'The argument of counsel is that, if no express contract against taxation can be found here, it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state Constitution and state laws.' 109 U. S. 398, 400, 27 L. ed. 976, 977, 3 Sup. Ct. Rep. 205, 206."

This case was but an affirmation of the doctrine announced in *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528, 25 L. ed. 912; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888. The New Orleans case was quoted with approval, and the former cases in this court reviewed in the recent case of *New York ex*

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rel. *Metropolitan Street R. Co. v. New York State Tax Comrs.* 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705. In that case the decision of the New York circuit court of appeals was affirmed, sustaining the right of the state of New York to tax franchises of street railway companies, notwithstanding the railway companies had already paid for the right to construct, maintain, and operate and use street railroads in consideration of payment into the treasury of the city of New York of a percentage of their gross receipts. In that case Mr. Justice Brewer, who spoke for the court, said (pp. 37, 38):

"Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication, and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically of privileges in respect to the construction, operation, and maintenance of a street railroad. These were all that in terms were granted. As consideration for this grant, the grantees were to pay something, and such payment is nowhere said to be in lieu of, or as an equivalent or substitute for, taxes. All that can be extracted from the language used was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation."

Many state authorities have reached the same conclusion. We will refer to some of them: *Springfield v. Smith*, 138 Mo. 645, 37 L. R. A. 446, 60 Am. St. Rep. 569, 40 S. W. 575; *Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 99; *State ex rel. Cream City R. Co. v. Hilbert*, 72 Wis. 184, 39 N. W. 326; *Newport News & O. P. & Electric Co. v. Newport News*, 100 Va. 157, 40 S. E. 645; *New Orleans v. Orleans R. Co.* 42 La. Ann. 4, 21 Am. St. Rep. 365, 7 So. 59; *New Orleans v. New Orleans City & Lake R. Co.*, 40 La. Ann. 587, 4 So. 512; *San Jose v. San Jose & S. C. R. Co.* 53 Cal. 475, 481; *State v. Herod*, 29 Iowa, 123.

Applying these principles to the ordinances in question, we do not find in them any express relinquishment of the power to levy the license tax which is the subject-matter of this controversy. In some of them is found the language that "such payments are to be in addition to all taxes, as now or afterwards shall be prescribed by law." In one ordinance concerning consolidation of roads it is agreed, as to certain payments from gross receipts, that such "payments shall be in addition to all other taxes or license fees now or hereafter prescribed by law." In one of them is found the following language:

"Said Lindell Railway Company shall, in lieu of all payments now required of it under any and all previous ordinances, and such as are now, or may hereafter by ordinance passed be required of any railroad company whose tracks it is hereby authorized

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to acquire, etc., on the first day of (various months) pay to the city of St. Louis, etc. (various sums), which several sums said Lindell Railway Company, its successors and assigns, in consideration of the rights and privileges granted by this ordinance, hereby agrees to pay to the city of St. Louis, at the times,
* * * " etc.

The stipulation as to the payments to be in lieu of all other payments under previous ordinances, and such as are now or may, by ordinance, be hereafter passed, etc., in this ordinance, may well be referred to the special ordinances passed under the right to grant the use of the streets "in consideration of the rights and privileges" therein granted, and are not designated to repeal *pro tanto* the section of the municipal code then in effect, imposing a license fee on railway cars operated in the city.

No ordinance contains any express relinquishment of the right to exact a license fee or tax. It is true that the city, in granting the right to use the streets by special ordinance, and in exercising by general ordinance the right conferred in the charter to impose a license tax upon cars, is dealing with rights and privileges somewhat similar, but, nevertheless, essentially separate and distinct. In the special ordinances the city is making an arrangement with the railway company to confer the right to use the streets in consideration of certain things the company is to do by way of operation and otherwise, including, it may be, payment of fixed sums or a proportion of receipts in consideration of the rights and privileges conferred. The city does this by virtue of its power to grant rights and privileges and control their exercise in the streets of the city, — power expressly conferred in the charter of the city.

In the fixing of a license tax upon all companies alike for the privilege of using cars in the city, it is exerting other charter powers. It makes provision uniformly applicable to all persons or companies using street cars. It is a revenue measure equally applicable to all coming within its terms. We do not perceive that the exercise of the power to grant privileges in the streets in making terms with companies seeking such rights, in the absence of plain and unequivocal terms to that effect, excludes the city's right to impose the license tax under the power conferred for that purpose.

How, then, stands the case? Is it true that because the city has required and the company has agreed to pay certain sums fixed in amount, or based on the receipts, for the use of the streets, that it has thereby deprived itself of the power to exercise the authority existing at the time the ordinances were passed to license street railway cars, and, in the exercise of that power, to charge a license fee or tax? At the time when the several special ordinances were passed the city of St. Louis had the right, under its charter, to grant the use of the streets for the use of

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the company, upon the terms which are named in such ordinances. It also had authority under another provision of its charter to require a license fee on certain vehicles, including street railway cars. There was in force a section of the municipal code assessing this license charge at \$25 per annum for each car. (This is the code which has been amended by No. 21,087, in controversy.) It is stipulated that, until the passage of the last-named ordinance, the railway companies paid the license fees without objection. It is said in the opinion of the learned judge below that the tax, equal to one mill for each paid passenger, amounts to a tax of 2 per cent on the gross receipts, and is, therefore, an increase on what the company had theretofore agreed to pay. But the tax is not levied on the gross receipts as such, and any license tax, in whatever sum imposed, would take something from the gross receipts of the company.

It seems to us that this case is virtually decided by the rule laid down in *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406, which holds that because a street railway company has agreed to pay for the use of the streets of the city for a given period, it does not thereby create an inviolable contract which will prevent the exaction of a license tax under an acknowledged power of the city, unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation.

We are of the opinion that an application of settled principles, derived from the decisions of this court, shows that these ordinances do not contain any clearly-expressed obligation on the part of the city surrendering its right to impose further license fees or taxes upon street railway cars, and we are of the opinion that the learned circuit court erred in reaching the contrary conclusion, and in granting a decree perpetually enjoining the enforcement of the ordinance in controversy.

We have discussed this case on the record and briefs filed in No. 193. It was said by the learned counsel in the argument at bar that cases Nos. 194, 195 involved identical questions. For the reasons stated the decrees in the three cases are reversed.

Reversed.

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by the defendant over its line from St. Louis to Springfield and return, and, using such employee's pass, he went from St. Louis to Springfield to take treatment for his ailments in the hospital there, which was a part of the hospital system above mentioned. For a time he was treated, and on a certain morning took passage upon one of defendant's trains at Springfield bound for St. Louis, his home. This train arrived about 7 o'clock that evening, and deceased left the train unharmed. About 9 o'clock of the same evening, a man, partially undressed and in condition to retire for the night, was lying across one of the many street car lines of the city and was run over and killed by a passing car. Some two weeks later, the body was exhumed and identified as that of James B. Phillips. Plaintiff had no knowledge of the peculiar and untimely death until about the latter date. The claim is that Phillips was mentally unbalanced, which fact was known to defendant, and defendant was remiss in duty in not notifying his family of his departure from the Springfield hospital on his arrival in St. Louis, and, further, in turning loose upon the streets of said city, unattended, a man in that known mental and helpless condition. There are several peculiarly interesting questions, which, together with the incident facts, will be duly noted.

1. Plaintiff having been cast upon her proof, rather than upon the pleadings, the legal questions involved must be entwined with all pertinent facts shown. In such case the facts proven by her are established facts for the purposes of this review. At the threshold of the inquiry is the relationship between defendant and the Employees' Hospital Association of the Frisco Line, a corporation, separately incorporated by the leading officials of defendant. The hospital at which plaintiff's husband was treated was part and parcel of the hospital system managed by the association above named. Defendant contends that it is in no sense responsible for the negligent acts, if such there were, of the Employees' Hospital Association of the Frisco Line; that it is a distinct corporate entity, not under control of defendant; and that it is responsible for its own acts of negligence. This relationship between the defendant and the hospital association is important on the question of excluding certain evidence, in addition to the point now in review. The charter of this association was in evidence. By article 1 thereof the corporation is named. Articles 2, 3, and 4 read thus:

"Art. 2. The purposes for which this association is formed are the support of a benevolent and charitable undertaking in this: To provide medical and surgical treatment and care for the employees of the St. Louis & San Francisco Railroad Company, and of its associated companies, who may be injured or disabled by accident or sickness while in such employ, and in

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the line of duty, to such extent only and under such rules and regulations as may be prescribed from time to time by the trustee hereinafter provided for; and to furnish such employees with additional privileges and benefits, not inconsistent or interfering with the main object of the association as may from time to time be directed for the said trustees; and to that end purchase, acquire, erect and maintain, suitable buildings, with necessary land and appurtenances for hospital and other purposes within the purview of these articles; and to sell, convey, incumber and transfer any such property whenever said trustee shall direct.

"Art. 3. All the powers of the association and of any corporation into which it may be merged, shall be vested in and exercised by five trustees, who shall manage and conduct the business and control all its property; the names and residences of those who shall be trustees until their successors shall be chosen as hereinafter provided, are as follows: B. F. Yoakum, of St. Louis, state of Missouri. L. F. Parker, of St. Louis, state of Missouri. A. J. Davidson, of St. Louis, state of Missouri. C. C. Mills, of Monett, state of Missouri. Chas. Huffschnitt, of St. Louis, state of Missouri. Their successors shall be chosen at such time and in such manner as may be provided by the by-laws, which trustees shall adopt for the government of the affairs of the association, and which they shall make for the government of the affairs of the association and which they may amend as shall seem best to them.

"Art. 4. The association shall not engage in business for pecuniary profit in any form, and shall not have any capital stock; the funds necessary for carrying out its purpose shall be raised in such manner as may be provided by the by-laws."

Article 5 provides the place of business for the corporation, and article 6 provides the term of 50 years as the life of the corporation. By the rules adopted and promulgated by B. F. Yoakum, president of the board of trustees, it is provided, among other things, as follows: "Rules and Regulations. It being contemplated that, for the consideration of the contribution paid monthly by the members of the 'Employees' Hospital Association of the Frisco Line, a home and medical attention for the sick and injured of said association will be provided, in accordance with the following rules and regulations, it is directed: (1) Medical relief will only be furnished at the hospital of the association, except as hereinafter designated. (2) Only those who have become sick or injured while in the employ of the St. Louis & San Francisco Railroad System, and in the line of their duty, will be entitled to gratuitous treatment. Those suffering from any complaint which existed, or the cause of which existed, before the party last entered the employ of the railroad company, will not be entitled to treatment. (3) Employees of the railroad

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system taken sick or injured while at any point on the line of the St. Louis & San Francisco Railroad, on temporary lay-off, are entitled to treatment; provided, said sickness was contracted while in course of his employment prior to such lay-off, and provided, further, that they have become liable for dues for the month during which their sickness originated or injury occurred.

* * * (5) Any member who may be too seriously ill, or injured to be removed with safety to his life, may receive temporary aid along the line of the railroad, when authorized by the chief surgeon. * * * (11) Any member of the association who

desires medical treatment must take to his physician a written or printed notice from his employer that he is entitled to such treatment, and no employer will be allowed to furnish such notice unless he is fully satisfied that the patient is entitled to same.

All such printed or written notices are good only for the months in which they are issued, or for a single spell of sickness.

* * * (16) When a patient is too seriously ill or injured to be promptly sent to the association hospital, the attending physician or surgeon shall at once wire a full report to the chief surgeon and must act under instructions of rule No. 5 until further advised. However, at the earliest possible moment consistent with the patient's safety, he must be sent to the hospital."

Upon the organization of the hospital association, or shortly thereafter, the defendant in this case sent out rules to employees as follows: "The Employees' Hospital Association of the Frisco Line, having agreed to furnish necessary medical, surgical and hospital treatment to such employees of the St. Louis & San Francisco Railroad System as may become sick or injured while in the service of said companies, and to erect and maintain a hospital for the use of such sick and injured, and the employees of said system having agreed to contribute to a fund to be paid to said hospital association, to be used and expended by the association for such purpose, the following rules for the guidance of employees are hereby promulgated: (1) Mail carriers at stations where carrying the mail is the only duty performed by them for the company, are exempt from assessment, and are not entitled to the services and benefits of the hospital association. (2) The sick and injured employees above mentioned are entitled to hospital care and treatment free of charge so long as they require surgical or medical attention and obey the rules established for their protection, but not for a term longer than one year continuously unless by permission of the board of trustees of said hospital association. (3) Heads of departments and foremen will be furnished with blank certificates, and will issue them properly signed to such employees as are entitled to the benefit of the hospital association, and every employee receiving such certificate will be entitled to receive from the head

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of his department free transportation over the company's lines to the hospital, which, in case of emergency, when delay may be dangerous, will be provided by telegraph on application to the proper officer. These certificates are good only in the month for which they are issued. (4) The company hereby donates to the hospital association the use of its telegraph lines to facilitate the care and treatment of sick or injured employees, and therefore all persons in the service of said companies, and all others are hereby notified that no bills for medical or surgical services, nursing, drugs or funeral expenses, will be paid by these companies unless first authorized by the general claim agent. (5) In every case of personal injury to an employee, the conductor or foreman of the department in which the party is employed must report particulars as soon as possible by wire to division superintendent or head of department in which the accident occurs. State whether a surgeon has been summoned to attend, and if so, give such surgeon's name, and state further whether the injured man will be transported to general hospital. It will be the duty of the above officers to see that such telegraphic advice is promptly given them, and they will at once telegraph full particulars to superintendent, chief surgeon, and general claim agent. (6) If such injured employee can be moved, send him to general hospital by first train and notify chief surgeon and general claim agent. If the injured employee cannot be moved, place him in care of the nearest local agent and summons the most available local surgeon to attend him. If possible, he should be taken to the nearest emergency hospital, to be transported to general hospital when able. In case of absolute necessity when life or limb is involved, secure the nearest competent surgeon to give attention to the injured person until the local surgeon can reach the spot, or the injured person can be transported to general hospital or to one of the emergency hospitals. Be particular to notify such surgeon that his services are required for first attention only, and that any differences in the amount to be paid him by the hospital association for such service shall be decided by the chief surgeon or the hospital association as final arbiter. Notify the chief surgeon by wire at once of such employment, and also as to whether amputation or surgical operations are immediately necessary. (7) Stretchers for use of injured men will be placed at each station where division of local surgeons are located, and in cabooses and train baggage cars. (8) The conductor in charge of train having patients for general hospital will at once report that fact by wire to chief surgeon and to general claim agent, and state whether ambulance is required. In case such patients are for emergency hospitals, the division surgeon at the point where the emergency hospital is located must be similarly notified by wire.

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(9) In cases of wrecks or accidents when a number of persons, either passengers or employees, are injured and require immediate attention, summon at once the nearest competent surgeon, summon at the same time the nearest division or local surgeon who can reach the scene of the accident most quickly, and in addition to the notice to be given division surgeon, superintendent or head of department, notify by wire, promptly, the chief surgeon, superintendent, and general claim agent, giving full particulars as to the name and whereabouts of the injured persons, name of surgeons in attendance, and state what further attention is required for the relief of the injured. * * *

(13) The persons who have been, or may hereafter be, appointed by the hospital association chief surgeons, assistants, hospital dispensary, division and local surgeons and physicians, are hereby appointed chief surgeon, assistants, division and local surgeons and physicians, as the case may be, of the St. Louis & San Francisco Railroad Company, and its leased and operated lines (while they hold such positions in connection with said hospital association), for the care and treatment under the rules above established of all passengers, citizens and nonemployees, who may be injured on the line of this company, and as such will be respected and assisted in the discharge of their professional duties when called upon. B. F. Yoakum, Vice President and General Manager."

The defendant likewise sent out an official circular of date June 29, 1899, as follows: "A large majority of the employees of this company have requested the establishment of a railway hospital system on the line of the St. Louis & San Francisco Road, similar to the system in vogue and successfully carried on by many railroad companies and their employees, with which the employees of this company are generally familiar, and have agreed to contribute to a fund for the proper care of such of their number as may become sick or be injured while in the service of the company. The benefits and advantages secured under this system by employees who unfortunately become disabled through illness or injury from following their usual avocation and thereby sustain consequent loss, have been conclusively demonstrated. The further fact that the employees secure hospital benefits, including medical and surgical attention, at a much less cost yearly than by any other assessment or insurance plan for that object, will commend to all concerned the establishment of the system on this company's lines. In pursuance to above, the employees' Hospital Association of the Frisco Line has been duly organized and incorporated, and a suitable building for the general hospital, for the treatment of sick and injured employees, erected at Springfield, Mo., which is owned by the association, and will be in charge of its chief surgeon. This building

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will be ready for occupancy August 1, 1899. Arrangements will be made with hospitals at St. Louis, Mo., Ft. Smith, Ark., Paris, Tex., Joplin, Mo., Pittsburg, Kan., and Wichita, Kan., for treatment in cases of emergency, until the patient can be safely removed to Springfield. Supply stations for dispensing purposes will be established at such convenient points on the line as shall be found necessary. Patients received at the hospital will be provided free of charge; with everything necessary for their careful and comfortable treatment, including the services of the hospital surgeons or physicians, so long as they require surgical or medical attention and obey the rules established for their protection, but not longer than one year, without special authority from the trustees. For the purpose of carrying into effect the above system, and to enable all the employees to become members of and entitled to all the benefits and privileges of said association, notice is hereby given to all concerned that, commencing with the wages for month of July, 1899, which are payable in August, an assessment will be made on the pay rolls (including salary vouchers), as follows: Thirty-five cents per month from the pay of each employee whose monthly wages amount to less than \$50.00 per month; fifty cents per month from the pay of each employee whose monthly wages amount to \$50.00 and less than \$100.00; seventy-five cents per month from the pay of each employee whose monthly wages amount to \$100.00 and less than \$125.00; \$1 per month from the pay of each employee whose monthly wages amount to \$125.00 and more. Deductions to apply to time checks as well as pay rolls. No deduction will be made from the earnings of an employee whose month's earnings do not amount to \$5. No deduction will be made from the wages of any employee who is discharged or quits the service of this company on or before the 31st day of July, 1899. After that date no exception will be made. Heads of departments, foremen and all others who issue time checks, will see that the proper deduction is made on the first time check issued in the month, designated 'Hospital.' In case an employee returns to service in the same month and after having drawn pay by time checks, and receives another time check in the same month, the person issuing the time check will note on the second check: "Hospital fees paid on previous check." This company will pay to said hospital fund as an assessment the sum of five hundred dollars annually, in monthly installments. All employees of the St. Louis & San Francisco Railroad System are entitled to hospital benefits under such rules and regulations as may be established for the government of the hospital. Rules and regulations governing the disposition and treatment of ill and injured employees will be issued and all employees should become familiar with those regulations, as they are established for the

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benefit of all. The surgeons and physicians of the St. Louis & San Francisco Railroad Company, will, on and after August 1, 1899, be under the control and direction of the chief surgeon of the hospital association, and all ill or injured employees will, on and after that date, be under the care and treatment of the hospital association. B. F. Yoakum, Vice President and General Manager."

From this circular it appears that no option is left an employee; but, on the other hand, defendant appropriates a certain amount of his wages and furnishes him medical treatment. From oral evidence it appears that the officers of this hospital association were officers of the defendant; the treasurer was the same; the employees made no formal application for admission as members, but only signed pay rolls with the deductions made as provided for in the foregoing documents.

We have set out this evidence, perhaps, in more detail than should have been done, but the relationship between these two corporations is an important one, and not confined to this case alone. To our mind it is immaterial as to the true character of the hospital association as indicated by its charter provisions. It has, however, but few, if any, of the earmarks of a voluntary benevolent association. Nor are there any earmarks of a public charity. What is received is paid for by the recipients. Under the weight of authority it cannot be held to be a charitable institution. *Haggerty v. Railway Co.*, 100 Mo. App. 424, 74 S. W. 456; *Coe v. Washington Mills et al.*, 149 Mass. 543, 21 N. E. 966; *Brown v. La Societe Francaise*, 138 Cal. 475, 71 Pac. 516; *Miller v. Railway Co. (C. C.)* 65 Fed. 305; *Texas & Pac. Coal Co. v. Connaughton*, 20 Tex. Civ. App. 642, 50 S. W. 173. So that the rule that exempts such institutions from liability, as announced in *Murtaugh v. St. Louis*, 44 Mo. 480, does not apply. Nor are institutions of the character of the one disclosed by this record exempted from liability by the mere employment of competent servants. They must go further and competently treat the patients received. In such case they occupy the position of ordinary physicians and surgeons and are bound by the same rules which are too familiar for repetition here. If they undertake to furnish the treatment, not as a charity, they stand in no different light from the ordinary physician. But this question is really beside the issues in this case. No one can read this record without concluding that, if the thin corporate shell of the hospital association is broken, the yolk therein contained is the defendant. By rule 1 above quoted, defendant exempts certain mail carriers from assessment, and excludes them from benefits. By rule 3, the heads of the departments and the foreman of the defendant are furnished with blank certificates, which they fill and issue to employees entitled to receive benefits, and such heads of depart-

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ments and foreman, the alter ego, of defendant, thus decide who shall be treated by the hospital association. By rule 5, the defendant's chief surgeon and general claim agent must be notified, and by rule 6, if the employee injured can be moved to the hospital, the chief surgeon and general claim agent must be notified. Why notify the general claim agent of defendant, if the two corporations were separate and distinct entities, in fact? That the hospital association is operated for the benefit of defendant as much or more than for the benefit of the employees is too apparent from this record. Rule 8, above, breathes the same thought, as also do rules 9 and 10. But, beyond all is rule 13, which makes the chief surgeon, and other surgeons of the hospital association, the chief surgeon and the local and division surgeons of the defendant. Eliminating all other matters, this rule 13 makes the chief surgeon and other surgeons the agent and employees of the defendant. But further showing that the hospital association, or its several surgeons, is but the alter ego of defendant, we have circular No. 35, *supra*, by which defendant says to all employees that they will be assessed to pay for this medical attention. No option is given an employee. By force of this rule, defendant says to an employee: "We will take so much of your monthly earnings, and in the event you are hurt or become sick, and in the judgment of the heads of the departments and the foremen in our employ you are entitled to medical treatment, we will furnish it to you through the hospital association." So that it becomes unnecessary in this case to break the extremely thin and attenuated corporate shell of the hospital association, and expose to open view the yolk therein contained. The hospital association, whether it in fact be a separate corporate entity, or in fact the defendant itself, masquerading under an assumed name, is at least the agent and employee of the defendant to perform these particular services. The defendant pays its said agent \$500 annually, and in addition it requires of its employees that they pay to it the remainder, and by it such sum is paid to the agent for these services. To say the least, this hospital association, together with all its surgeons and physicians, are but agents of defendant, and made so by express words in rule 13, *supra*. The negligence of these agents is the negligence of the defendant. As said in the case of *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929, the defendant holds the purse strings of the hospital association. Not a dollar does it get save through defendant. Defendant pays for itself \$500, and the remainder is paid by the tribute which defendant levies upon its employees, which is collected and paid through defendant. The hospital system is a worthy one, and a well-taken, advance step; but, under the record in this case, such hospital association is but the agent of the defendant.

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2. We come now to the competency of the following letter: "St. Louis & San Francisco Railroad Company. G. W. Cale, Jr., Chief Surgeon. Springfield, Mo., Apr. 13, 1904. Mr. W. P. Newton, Assistant General Auditor, St. Louis, Mo.—Dear Sir: Mr. J. B. Phillips, who was in the hospital, is mentally unbalanced and should be sent to an asylum for treatment. Won't you please advise his family or friends so that necessary steps can be taken to protect him? Yours truly, G. W. Cale, Jr. (C-d.)" Stamped on back: "Vice Pres't & Gen'l Auditor, Apr. 14, 1904. St. L. & S. F. R. R. Co."

The writer of this letter was the chief surgeon of the hospital association, and, by rule 13 hereinabove discussed, was the chief surgeon of the defendant. He was therefore the agent of defendant having in charge the treatment of the deceased. Under rule 13, *supra*, defendant seems to have had a chief surgeon, division surgeons, and local surgeons, and Dr. Cale was the head of this line of medical agents under the appointment of defendant by force of this rule. The letter was written to the assistant of the head of another department. It conveyed the facts which Dr. Cale had learned in the course of his official duties as the chief surgeon of defendant, under rule 13, *supra*. It was at least partly for the information of a co-ordinate department of the defendant railway company's service. This letter was written two days after the death of plaintiff's husband, but at a time when neither the plaintiff, the defendant, or the writer knew of such fact. The letter was excluded by the learned trial judge. Was his action in this respect correct?

We think not. Rule 4 of the hospital association reads: "The association will not furnish treatment for contagious, chronic, incurable, or venereal diseases, nor cases of insanity, nor injuries or diseases the result of intemperance, vicious habits, personal difficulties." By rule 3 of the defendants hereinabove fully set out, the deceased, being at work in the auditor's department of defendant, could not even gain admission to the hospital without a certificate from the head of that department, nor could he get transportation to which he was entitled, save through that department. Under these rules, when taken and considered together, it became and was the duty of the chief surgeon, or what we might term the head of the medical department of defendant, to inform the head of the department issuing the certificate to deceased, under rule 3 of the defendant, that such party was insane, and, under rule 4, quoted last above, was not such a person to whom medical attention was due. This letter therefore is but one written by the chief surgeon of defendant in the line of his duty, as such duty appears from the uncontradicted record evidence. It in effect notified the auditor's department that the man was insane, and should be sent to a proper asylum, that he

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was not entitled to further treatment in the hospital under the rules thereof, and that no further certificates should be given him. If Dr. Cale was the agent of the defendant, as we have seen that he is, then such an admission made pertaining to things occurring and being done by him in the course of the performance of that duty is an admission of the defendant. The letter head upon which the letter was written shows him to be defendant's chief surgeon, as well as the chief surgeon of the hospital. This was the third time that the deceased had been under the treatment of the hospital force, and, if he was insane, it was the duty of defendant's chief surgeon, who was also chief surgeon of the hospital, to make known that fact under the rules above mentioned. His duties had not yet terminated, and when he wrote the letter he was simply in the performance of such duties. Under such circumstances, this letter is in the nature of a report made by one official to another, and is not in the same line as a statement made, after an accident, but too late to be recognized as a part of the *res gestæ*. The cases usually applying the *res gestæ* doctrine have no application here.

We think that this letter is in the nature of an official report from one of the chief officials of defendant to another of such officials, and a report which was contemplated by the rule. It stands in the nature of an admission by an agent, whilst acting in the line of duty, and as such is an admission of defendant. *Malecek v. Railway Co.*, 57 Mo., loc. cit. 21; *McGenness v. Adriatic Mills*, 116 Mass., loc. cit. 180; *Wharton's Law of Evidence* (3d Ed.) § 1177. In the Missouri case cited, it was said: "The evidence of the admissions of Buell, the company's superintendent, was certainly admissible to prove that it recognized the assault, etc., of its driver, and justified it upon the ground of the nonpayment of fare. Corporations can only act and speak through their authorized agents. The acts and admissions of Buell, in this regard, were those of the corporation." The Massachusetts court, in the case cited, speaks tersely in this language: "The remaining question is in reference to the admission in evidence of the statement of the superintendent. The defendant is a corporation, and can only act through agents, and in the absence of any evidence to the contrary, the superintendent in charge of the mill must be deemed the proper person to whom to make complaint and to have authority to give information and direction in regard to the drainage from it. His recognition that it was a matter that required to be attended to, and should be, was therefore properly put in evidence. *Morse v. Connecticut River Railroad*, 6 Gray, 450. The expression used by him that he 'would not have it around his place as it was around there for \$500' was a mere mode of stating that the nuisance existed, and could not have been considered as an

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admission that this sum was the amount of the damages; nor do we understand that it was put in evidence as such." And Dr. Wharton, in his most excellent work, couches the rule thus: "As has been already incidentally seen, a party who commits the management of his whole business, or a particular line of his business, to an agent, is bound by the admissions of the agent, as to his entire business committed to him; nor when the agent is a general agent, representing his principal continuously, is it necessary for the admission of such declarations that they should either have been part of the *res gestæ* or should have been specially authorized. Eminently is this the case with corporations." Other cases are cited in the briefs, and others not cited could have been cited; but these suffice to illustrate the rule. Said letter is at least admissible to show that Dr. Cale, defendant's chief surgeon and agent, had knowledge of the fact that deceased was unbalanced in mind, when he permitted him to be placed upon the train unattended. *McDermott v. Railway Co.*, 87 Mo. 285. To what was said by Henry, C. J., in that case we can add nothing, for the proposition is fully discussed and the cases reviewed. There was error in refusing to admit this letter.

3. It is next contended that defendant is liable only for such injuries which could have been reasonably expected to have been foreseen; that is to say, if it be granted that defendant was negligent, yet it is only liable for such injuries as would reasonably be expected to follow from such negligence, and not for mere remote contingencies. In this we think the defendant is correct. But apply the rule to this case. In the view we have just expressed, the defendant, by and through its agent, had assumed the duty of treating the deceased. The evidence tended to show that the patient was insane, and that defendant had knowledge of that fact. Now, if the patient was insane, and the defendant had knowledge of that fact, then might it not have reasonably presumed that accident might befall a man in that condition? The freaks of a wandering mind are varied, it is true; but none knew them better than the skilled chief surgeon, who represented the defendant, when he had the deceased conveyed to the train. We are not saying that the act of placing his practically undressed body across a street railway track was the result of his insane condition; but there are sufficient circumstances to authorize the submission of the question, under properly guarded instructions, to a jury for its decision. It cannot be said that such an act was not one that could not have been reasonably anticipated by defendant's surgeon when he placed an insane man aboard of a train, unattended, and without notice to his family, knowing that he would have to find his home in a populous city, filled with a network of street railway lines. The rule is properly stated by Thompson, in his work on the Law of Negligence (section 59),

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thus: "‘It is not necessary,’ said the Supreme Court of Minnesota, following the Supreme Judicial Court of Massachusetts, ‘that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.’ In other words, it is not necessary to a defendant’s liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him. It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question.” This rule has found full recognition in this state. *Miller v. Ry. Co.*, 90 Mo., loc. cit. 394, 2 S. W. 439. A case very much in point is the case of *Railway Co. v. Parry*, 67 Kan. 515, 73 Pac. 105. In the Parry Case, the passenger became mentally unbalanced whilst on the train, and was by the conductor placed in charge of the depot master after being taken from the train. The depot master permitted him to leave the depot and his custody while in that condition. He wandered some five miles, and, placing himself across the track, was killed. The case before us is much stronger. Here the deceased occupied a double relationship to the defendant. He was not only a passenger, but he was likewise a patient being treated by defendant’s agent. Defendant’s agent had full knowledge, if the evidence be true, that deceased was insane. Defendant, through its agent, had that knowledge when deceased was placed on the train, and this exclusive of the evidence tending to show the condition and actions of deceased whilst on the train. Of course, if the deceased was not insane, it matters not what means he used to end his life. If he was not insane, there can be no liability upon the part of defendant. Defendant’s liability must be bottomed on the facts that deceased was insane, that defendant knew such fact, and that his death was occasioned by reason of such fact. It must be found that the act of lying down upon the railroad track was the result of his mental condition aforesaid. In his unfortunate death there are some circumstances tending to show that a perverted mind might have been attempting to place a tired body to rest for the night. For instance, the taking off of the outer garments.

Under proper instructions, this cause should have been submitted to the jury, and the trial court erred in giving the peremptory instruction for the defendant.

The cause is reversed and remanded, to be proceeded with in accordance with these views. All concur.

ECORSE TP. *v.* JACKSON, A. A. & D. RY. *et al.*

(Supreme Court of Michigan, July 1, 1908.)

[117 N. W. Rep. 89.]

Street Railways—Acquisition of Rights in Road—Statutory Provisions—Consent of Adjoining Owners—Fraud in Securing Consent of Some Owners—Effect.—Under Comp. Laws, c. 164, § 51, art. 2, as amended by Laws 1901, p. 370, No. 238, permitting the construction of interurban railroads upon public highways under certain conditions, provided the company obtains the consent of two-thirds of the owners of adjoining property, if the consent of more than the required two-thirds of the adjoining property owners was properly obtained, the fact that the consent of two others was obtained by fraud would not affect the validity of the company's right.

Eminent Domain — Compensation — Additional Servitude — "Railroad"—"Street Railway."*—There is a well-defined distinction between the definition of the words "railroad" and "street railway." The one is a word of general and extended meaning, applying to all roads incorporated under the general law, and has always been held to impose an additional servitude upon a public way for which abutting owners are entitled to compensation. The other is local in its signification, referring to transportation of a character entirely different from that of a general railroad, and has been held to add no burden as an additional servitude.

Statutes—Titles and Subject-Matter—Constitutionality — Railroads and Street Railways.—Comp. Laws, c. 164, entitled "An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management, and to fix the duties and liabilities of all railroads and other corporations owning or operating any railroad in this state," was amended by Laws 1901, p. 370, No. 238, by adding to article 2 thereof a new section, to wit, section 51, which gave to corporations organized to construct and operate street and interurban railroads, operated by other than steam power, authority to construct such roads on streets, highways, etc., on certain terms. Held, that the amendment relating to street railways was not germane to the purposes of the general railroad law as expressed in the

*For the authorities in this series on the question whether street railways are railroads, within the meaning of statutes, see foot-note appended to *Comm'r's v. Scioto Valley Traction Co.* (Ohio), 23 R. R. R. 666, 46 Am. & Eng. R. Cas., N. S., 666.

For the authorities in this series on the question whether a street railway is an additional servitude upon streets, see foot-notes appended to *Abbott v. Milwaukee, etc., Co.* (Wis.), 24 R. R. R. 19, 47 Am. & Eng. R. Cas., N. S., 19; first foot-note appended to *Wilder v. Aurora, etc., Co.* (Ill.), 20 R. R. R. 99, 43 Am. & Eng. R. Cas., N. S., 99; *Laroe v. Northampton St. Ry. Co.* (Mass.), 20 R. R. R. 96, 43 Am. & Eng. R. Cas., N. S., 96.

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title; hence the act of 1901 was unconstitutional, as in violation of Const. art. 4, § 20, providing that no law shall embrace more than one object, which shall be expressed in its title.

Appeal from Circuit Court, Wayne County, in Chancery; Henry A. Mandell, Judge.

Bill by the township of Ecorse against the Jackson, Ann Arbor & Detroit Railway and others for an injunction and other relief. From a judgment dismissing the complaint, plaintiff appeals. Reversed and injunction granted.

Argued before GRANT, C. J., and BLAIR, MOORE, CARPENTER, and MCALVAY, JJ.

James H. Pound, for appellant.

Graves, Hatch & Wasey, for appellees.

MCALVAY, J. Complainant township filed its bill of complaint against the railway company and the commissioner of highways of said township, who are the principal defendants to the suit, asking for a discovery from them to know by and under what agreement or by what right said railway claims to enter upon a highway of said township and occupy the same, and also for an injunction against them to restrain them from constructing a railway upon a certain road running through said township, and for general relief.

Defendant railway is a Michigan corporation, organized under the general railroad law of the state. Application was made by it through its vice president, who appeared before the township board, for a perpetual right of way for a street car line on Fort Street Boulevard in said township, such right of way to take 24 feet from the center of the highway. Objections were made to a perpetual franchise, to a T-rail as proposed, and also to the proposed crossings. Nothing further was done before the board. Defendant railway proceeded to enter upon said highway, and to take possession of 24 feet in the center thereof, and to construct a railway thereon, laying an ordinary T-rail. This it now appears was done under claimed authority of defendant highway commissioner, who, without the knowledge or consent of complainant, entered into an agreement with defendant railway authorizing it to construct such railway and to enjoy its franchise without limit as to time. This agreement was not filed or recorded until after this suit was commenced. The authority under which the highway commissioner acted is given by Act No. 238, Pub. Acts 1901, p. 370, which provides as follows: "Section 1. That article two of chapter one hundred sixty-four of the compiled laws of the state of Michigan of the year eighteen hundred ninety-seven, said chapter one hundred sixty-four being 'An act to revise the

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laws providing for the incorporation of railroad companies and to regulate the running and management, and to fix the duties and liabilities of all railroads and other corporations owning or operating any railroad in this state,' be amended by adding a new section thereto, to be known as section fifty-one, and read as follows: Sec. 51. When any corporation is organized under this act for the purpose of constructing, maintaining, and operating a street, suburban or interurban railroad, whose cars shall be operated by motive power other than steam engines, such railroad may be constructed upon any public street, lane, alley or highway of any village on such terms and conditions as shall be agreed upon between the railroad company and the village board of such village; and such railroad may be constructed upon any public street, lane, alley or highway of any township on such terms and conditions as shall be agreed upon between the railroad company and the commissioners of highways of such township: Provided, the railroad company shall have obtained the consent to the construction thereof of two-thirds of the owners of property adjoining the roadbed of such railroad in such township; and if such consent from any owner cannot be obtained by agreement, then for such consent compensation shall be made by the railroad company to such owner, which shall be ascertained as herein prescribed for obtaining property or franchises for the purpose of its incorporation." The claim of complainant that all of the signatures of owners giving consent to construction required by statute were fraudulently obtained is not supported by the record. Of the two instances relied upon as fraudulent but one of them can be said to support the claim, although the testimony indicated that absolute frankness was not used in the other case. This cannot be in any way controlling, for the reason that more than the required two-thirds of the property owners were secured. The trial court denied the relief prayed, and dismissed the bill of complaint without costs.

The first question raised by the complainant is that the act under which defendant corporation claims to be authorized to enter upon and occupy the highway in question, and construct a railway thereon by an agreement with the highway commissioner, violates article 4, § 20, Const., which provides that no law shall embrace more than one object, which shall be expressed in its title. It will be seen from the entitling of the general railroad law given above in the act of 1901 that the object provided for is the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroads, and other corporations owning and operating any railroad in this state. The general railroad law in practically its present form embodied in chapter 164, Comp. Laws 1897, is the Revision of 1873. Both before and since that revision many of

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its provisions have been before this court for construction. Previous to 1871 the general railroad law contained no authority for the use of streets. In 1871 authority was given to lay railroads in streets under certain conditions, one of which was the payment of damages and compensation to abutting owners before occupation by the railroad. Since that time this requirement has been upon our statute books, and remains unrepealed. In recent years conditions in cities and the more densely populated communities have required methods of transportation of the inhabitants which would relieve the congestion of the streets in such places, and from these conditions has grown up the street railway system of the country. Laws have been enacted authorizing corporations to be organized for the purposes of constructing, owning, and operating these street railways. This system has in time extended to what has been called suburban and interurban railways. In this state until the enactment of the act of 1901, relied upon by defendants, the operation and construction of these street railways has not been authorized under our general railroad law. Under the laws authorizing the construction and operation of street railways before the act of 1901, decisions have been rendered by this court, supported by the decisions of the courts of last resort of some other states, holding that such railways constructed upon and along the public highways were not an additional servitude, and that the abutting owners could not recover damages by reason of the use of such highways for that purpose. *City Ry. v. Mills*, 85 Mich. 643, 48 N. W. 1007; *People v. Railway Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; *Dean v. Railway Co.*, 93 Mich. 330, 53 N. W. 396. Judge Cooley, in *Grand Rapids & Indiana R. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306, said of a street railway: “* * * So far from constituting a new burden it is supposed to be permitted because it constitutes a relief to the street; * * * it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel, instead of constituting an embarrassment. * * * It is enough that the use of a street for a city railway is a proper, and therefore a lawful, use.” Upon this and similar reasoning it has been held by this court that a street railway is not an additional servitude.

The object of the amendment of 1901 was to graft on to the general railroad law a section under which corporations organized under it could enjoy all the rights and benefits of street railways, and the further right in townships to acquire franchises in the public highways without limit as to time, and without any control by the municipality as to fares, speed, and many other matters, at least as far as the provisions of the amendment are concerned, all this to be accomplished by “an agreement with a highway commissioner after obtaining consent of two-thirds of the abutting

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owners." The object expressed in the entitling of the act has already been stated. The object contained in this amendment is not expressed in that entitling. The amendment was not germane to the purposes of the general railroad law. No street railway was ever contemplated in and by its terms. A reading of the entitling would give no intimation of the object in the body of the amendatory act. There is a well-defined distinction between the definitions of the words "railroad" and "street railway." One is a word of general and extended meaning applying to all roads incorporated under the general law. The other is local in its signification, referring to transportation of a character entirely different from that of a general railroad. One has always been held to impose an additional servitude upon a public way for which abutting owners were entitled to compensation. The other, as already stated, has been held to add no such burden. The act amended did not provide for the incorporation of street, suburban, or interurban railways, as might be inferred from reading the amendment of 1901. In the Mills Case cited, *supra*, the writer of the majority opinion recognized the fact that the general purpose of the law then under construction (being the train railway act) was to provide for local transportation only as distinguished from transportation by railroads generally. In the Heisel Case, *supra*, Mr. Justice Cooley distinguished between railroads and street railways. He said: "It is, to my mind at least, doubtful whether it is competent for the public authorities to bind the interests of individuals by any consent they may give to the occupation for railroad purposes of a public highway, when the land is owned by private parties. If the railroad were only a city railway constituting a mere local convenience, and calculated to relieve the pressure of traffic and travel upon the street, the question, of course, would be different. * * * A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street. * * * But we cannot say the same in the case of the ordinary railroad. It is not usual for such a road to be laid in one of the highways, and the cases in which it is permitted are exceptional. For that reason, therefore, if for no other, the owner whose land is taken for a highway * * * cannot be understood to have assented to its being appropriated * * * to railway purposes at the discretion of the public authorities, and to have been compensated for such appropriation. Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established. * * * The two uses, on the other hand, come seriously in conflict. The railroad constitutes a perpetual embarrassment to the ordinary use. * * *"

This quotation is made to show the view of the learned justice in distinguishing between them as to their objects and uses, as well

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as to accentuate the proposition that the object of the amendatory act was not expressed in the title of the amended act. The object of that act was to provide for the incorporation of companies to engage in state-wide transportation. It is unnecessary to extend the discussion. Much might be said in support of the argument concerning the system of taxation and of state and municipal control of and restrictions upon ordinary railroads.

The question as to whether corporations organized under the general railroad act can be authorized to construct, own, or operate street railways is not before us, and we do not express any opinion upon that question. We do decide that this act of 1901 is unconstitutional and void for the reasons given, and therefore does not confer authority upon defendant corporation to do the acts complained of in this case.

The decree of the circuit court is reversed, and a decree will be entered in favor of complainant, and defendants will be perpetually enjoined from doing the acts complained of, with costs of both courts.

SOUTHERN RY. CO. *et al.* v. GRIZZLE.

(Supreme Court of Georgia, Aug. 15, 1908.)

[62 S. E. Rep. 177.]

Commerce—Regulation of Conduct of Business—Railroads—Checking Speed at Crossings.*—The provisions of Civ. Code 1895, § 2222, requiring the engineer of a locomotive to check the speed thereof on approaching a public crossing, so as to stop in time, should any person or thing be crossing the railroad track on such crossing, is not,

*For the authorities in this series on the subject of state interference with interstate commerce, see foot-note appended to *Halliday Milling Co. v. Louisiana, etc., R. Co.* (Ark.), 27 R. R. R. 310, 30 Am. & Eng. R. Cas., N. S., 310; foot-notes appended to *Charles v. Atlantic Coast Line R. Co.* (S. Car.), 27 R. R. R. 130, 50 Am. & Eng. R. Cas., N. S., 130; *Jonesville Mfg. Co. v. Southern Ry.* (S. Car.), 27 R. R. R. 116, 50 Am. & Eng. R. Cas., N. S., 116; first foot-note appended to *Pittsburg, etc., Ry. Co. v. Hartford City* (Ind.), 27 R. R. R. 82, 50 Am. & Eng. R. Cas., N. S., 82; *Venning v. Atlantic Coast Line R. Co.* (S. Car.), 26 R. R. R. 666, 49 Am. & Eng. R. Cas., N. S., 666; *Cincinnati, etc., R. Co. v. Commonwealth* (Ky.), 26 R. R. R. 632, 49 Am. & Eng. R. Cas., N. S., 632; foot-note appended to *Stare v. Cumberland & P. R. Co.* (Md.), 25 R. R. R. 122, 48 Am. & Eng. R. Cas., N. S., 122.

For the authorities in this series on the subject of the police powers of a state over railroad companies, see last foot-note appended to *Cincinnati, etc., Ry. Co. v. Commonwealth* (Ky.), 27 R. R. R. 616, 50 Am. & Eng. R. Cas., N. S., 616; last foot-notes appended to *Pittsburg, etc., Ry. Co. v. Hartford City* (Ind.), 27 R. R. R. 82, 50 Am. & Eng. R. Cas., N. S., 82; last foot-note appended to *Osteen v. Southern Ry.* (S. Car.), 25 R. R. R. 300, 48 Am. & Eng. R. Cas., N. S., 300.

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with respect to a railroad company doing an interstate business, violative of section 8, art. 1, of the Constitution of the United States, as being a regulation of interstate commerce, but is a police regulation, designed to secure the public safety, and is valid as such. *Hennington v. State*, 90 Ga. 396, 17 S. E. 1009; *Seale v. State*, 126 Ga. 644, 55 S. E. 472; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166.

Same.—The court committed no error in refusing to allow an amendment, offered by the defendant railroad company in this case, alleging that the Code section above cited was void because of being violative of the provisions of the Constitution of the United States above referred to, and that the failure to comply with the requirements of such Code section by the defendant company in the operation of one of its trains then engaged in doing an interstate business could not lawfully be attributed to it as negligence.

Trial—Instructions—Submission of Matters Not Sustained by Evidence.—The following charge of the court was error, requiring a new trial: "Although the plaintiff's husband may have been negligent, if you believe that the railroad company, defendant, was willfully negligent, then the plaintiff would be entitled to recover." There was no evidence to show willful infliction of the injury, and the language of the court was subject to the construction that, if the engineer willfully or intentionally omitted to comply with the requirements of the crossing law, the plaintiff was entitled to recover, regardless of any amount of negligence, or failure to use ordinary care, by her husband.

Same—Invasion of Province of Jury.—It was not error to refuse a timely written request, made by the defendant, to charge the jury as follows: "If you believe that the plaintiff's husband deliberately went upon the railroad track at the crossing in Norcross in front of an approaching train, thinking that he could cross before the train reached him, and miscalculating its speed for any reason, the plaintiff cannot recover for the death of her husband resulting from being run down by the train, although the company's servants may have been negligent in running at a high rate of speed at that point, and also in failing to check the speed of the train at a public road or street crossing where it occurred." Such a charge would have been in effect an instruction to the jury that certain facts would have constituted negligence on the part of the deceased. *Civ. Code 1895, § 4334*; *Atlanta & West Point R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29. (Beck and Holden, JJ., dissenting: The above charge was legal and applicable in this case, and under the facts thereof the refusal to give it was error. *Thomas v. Cen. of Georgia Ry. Co.*, 121 Ga. 38, 48 S. E. 683; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49 [5]; *Thompson v. Thompson*, 77 Ga. 692, 3 S. E. 261; *Roberts v. State*, 114 Ga. 450, 40 S. E. 297; *Central Ry. Co. v. Goodman*, 119 Ga. 234, 45 S. E. 969.)

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Same—Requested Charges Covered by Charges Given.—The other charges requested, so far as legal and pertinent, were covered by the charge of the court given to the jury.

Same—Construction as a Whole.—In view of the entire charge, the other portions of the charge complained of were not subject to the objections made thereto.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; J. J. Kimsey, Judge.

Action by A. H. Grizzle, by reason of the death of her husband, against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Ino. J. Strickland, for plaintiffs in error.

Atkinson & Born, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

SOUTHERN RY. CO. v. BROWN *et al.*

(Supreme Court of Georgia, Aug. 12, 1908.)

[62 S. E. Rep. 177.]

Judicial Sales—Nature and Essentials—Attachment—Sale.—Where an attachment sued out by a creditor of a nonresident railroad company is levied upon one of its freight cars standing idle and empty in this state, upon the spur track of another railroad company, which under a contract with such owner is in possession of such car, with a right to use, load, and send it beyond the limits of this state, and an order has been obtained to sell such car after 10 days' notice, held, upon the hearing of an application for injunction by the company having such possession to prevent the sale of such car, it is not error to grant such injunction conditioned upon the plaintiff giving bond in a named sum to return the car to the proper officers of court after its right to use the car under such contract has expired.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Southern Railway Company against Brown and others. From the judgment, plaintiff brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman, for plaintiff in error.

Smith, Berner, Smith & Hastings, for defendants in error.

HOLDEN, J. Charles Brown, one of the defendants, had an at-

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tachment issued against the Mobile & Ohio Railroad Company, upon the ground that it was a nonresident of this state, and had it levied upon a freight car belonging to said company in the possession of the plaintiff. An order was obtained by Brown to sell the car, because of its being expensive to keep. The attachment proceedings were returned to the city court of Atlanta. The plaintiff sought to enjoin the levy and sale and interference with its possession and use of the car. Upon the hearing the court granted the injunction, provided the plaintiff would give bond in the sum of \$1,000, conditioned to return the car to the officers of court after its right to use the same had expired under the contract attached to the petition, and under which contract the plaintiff claimed to have held the car. In this judgment the plaintiff was given three days within which to give the bond, during which time the restraining order previously granted was continued in force. To this judgment the plaintiff excepted. Upon the hearing the plaintiff introduced the following evidence: A written agreement between it and the Mobile & Ohio Railroad Company and other railroads, by virtue of which one road had the right to use the cars of another, for a named charge for hire per day, and, when a car belonging to one railroad company came into possession of another, such road had the right to hold and use the same in accordance with certain specifications set forth in the contract, and in such use had a right to send it out of the state. The plaintiff operates under the interstate commerce law, and at the time of the levy there was a large movement of freight over the lines of the company, and especially over the lines going out of the city of Atlanta. It was heavily taxed to provide cars for shipment, and on many occasions was unable to provide cars for such movements, and freight was frequently delayed because of the plaintiff's failure to have sufficient cars to meet the demand of shippers. Various roads interchange cars, and in this way cars become scattered all over the United States. The plaintiff now needs all of its cars and the cars of other roads in its possession. The levy will result in delay to its business, and compel it to hold over freight because of its inability to use the car levied upon. The defendant offered evidence to show that the car, when levied upon, was empty and on a spur track of the plaintiff in Atlanta, Ga. The spur track connected with other tracks only at one end, and this car was the last car on the spur track nearest to the end not connected with another track. The car was standing empty and idle, and no goods were being loaded on it.

The plaintiff contends: That it operates under the interstate commerce law, doing an interstate business as a common carrier: that the seizure of the car and sale of the same would interfere with interstate commerce, and with the duties of the plaintiff and of the Mobile & Ohio Railroad Company to the public: that they could not use the car without losing control and jurisdiction over

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it; that the property of a common carrier cannot be sold in piecemeal; that the proper way to collect a debt from it is a sequestration of the proceeds of its earnings; and that it was the duty of the plaintiff to protect the property of the Mobile & Ohio Railroad Company, another carrier, from illegal seizure. There have been many decisions upon the question as to whether or not the cars, engines, and other rolling stock of a railroad company may be levied upon and sold. Some authorities hold that it can be done, and others that it cannot. Many hold that it can only be done when the rolling stock is not in actual use at the time of the levy. The car levied on in this case was not in actual use at the time of the levy. Its seizure therefore at this time did not immediately interfere with the duties of either of the railroads to the public, or with interstate commerce. If the seizure and sale of this one car might create such interference at some time in the future, it did not do this at the time of the seizure, as the car was then empty and idle. The fact that a creditor, in the prosecution of his rights to collect a debt by attachment of the property of his debtor, a nonresident railroad corporation which is a common carrier, may, by the levy and sale of an empty and idle freight car of the debtor, incidentally affect future interstate commerce, will not render such proceeding illegal. If such empty and idle freight car was not subject to levy in Georgia because it was an instrument of interstate commerce, it would not be subject to levy in the state of the residence of the Mobile & Ohio Railroad Company, because, if it is an instrument of interstate commerce, it would be such instrument in one place as well as another. A local corporation whose line did not extend beyond the state would likewise hold its rolling stock immune from levy and sale if it permitted it to be used in interstate commerce, and it was liable in the future to be so used if the law were different from the rule above announced.

One of the questions involved in this case was passed on by this court in the case of Southern Flour & Grain Company v. Northern Pacific Railway Company, 127 Ga. 626, 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356. We have been requested to review and overrule this decision. However, we think the ruling there made is correct, and will not disturb it. We do not think the levy of an attachment against a nonresident railroad company on one of its freight cars standing empty and idle on the spur track of a railroad in this state is invalid, and a sale thereof cannot be enjoined on the ground that such levy and sale are an interference with interstate commerce or the duties of a common carrier to the public, or on the ground that a part of the property of a nonresident railroad corporation serving the public as a common carrier cannot be sold under attachment to pay its debts, but the collection of the debt should be made by the sequestration of the earnings of such nonresident corporation, or on any other

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ground referred to in the briefs of the counsel for the plaintiff. See the authorities referred to in the case cited *supra*. See, also, *City of Atlanta v. Grant*, 57 Ga. 340; *Drake on Attachments* (7th Ed.) § 252a, p. 253a; *Kneeland on Attachments*, § 321, p. 237.

The fact that the plaintiff held the car under the contract referred to would not make the levy of the attachment on it illegal. If the plaintiff was a hirer of the property in question, the judgment of the court granting the injunction, provided the plaintiff gave bond to return the car as provided for in the order, was one of which the plaintiff cannot complain in this case. Civ. Code 1895, § 2913. An attachment can be levied on property of a debtor, though hired to another before the attachment is issued. There is nothing in Civ. Code 1895, § 2913, preventing an attachment from being levied on such property, and we know of no other statute having such effect.

Judgment affirmed. All the Justices concur.

HARROLD *et al.* v. SEABOARD AIR LINE RY. *et al.*

(Supreme Court of Georgia, Aug. 18, 1908.)

[62 S. E. Rep. 326.]

Railroads—Real Estate—Forfeiture—Deed — Habendum Clause.*—

Uriah B. Harrold, the heirs at law of Thomas Harrold, and the administratrix of one Johnson, brought their equitable petition to recover from the defendants certain land which had been conveyed by Uriah B. Harrold, Thomas Harrold, and H. R. Johnson to the predecessors in title of the defendants. The deed of conveyance contains the following stipulation: "To have said several lots under the same tenor as if the same had been regularly condemned for right of way, depot, yards, side tracks, and other railroad purposes." The petition alleges that only a portion of said land is occupied by the railroad company for railroad purposes, having its track and certain railroad buildings thereon, and that the other and remaining portion of said land is occupied by permission of the defendant by private parties who have erected "monumental works and woodshed thereon." The petition also seeks a recovery of mesne profits against the defendant railroad company and one Clark; the latter being one of the private parties referred to who is in possession of a portion of the land conveyed by said deed. Held:

(1) The petition does not state a good cause of action for recovery of the land.

*For the authorities in this series on the subject of the forfeiture of a railroad right of way for failure to comply with the terms of the grant, see first foot-note appended to *Littlejohn v. Chicago, etc., Ry. Co.* (Ill.), 22 R. R. R. 409, 45 Am. & Eng. R. Cas., N. S., 409.

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Ejectment—Petition.—Said petition does not state a case as against the individual defendant, especially as it does not show what portion of the land is occupied for private purposes by permission of the company, nor for how long a time such portion of the land has been so occupied.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by W. B. Harrold and others against the Seaboard Air Line Railway and another to recover certain real estate. From a judgment for defendants on sustaining a demurrer to the petition, plaintiffs bring error. Affirmed.

Uriah B. Harrold, Mrs. Mary E. Boone, Louisa E. Davenport, Mariah Harrold, and Mrs. Josephine Johnson, administratrix of H. R. Johnson, deceased, brought an action against the Seaboard Air Line Railway and C. J. Clark to recover certain real estate in the city of Americus, alleging the following facts: On October 27, 1886, H. R. Johnson; lately deceased, Uriah B. Harrold, and Thomas Harrold, lately deceased, conveyed to the Americus, Preston & Lumpkin Railroad Company certain real estate in the city of Americus, "said property having been deeded to said railway company for railroad purposes only, the fee being reserved in and now is in said grantors and their legal representatives according to the tenor of the deed." The defendant railway company is the successor of the Americus, Preston & Lumpkin Railroad Company. The deed is attached to the petition, and the material parts of it are as follows: "We [the above-named grantors] do hereby sell and convey unto the Americus, Preston & Lumpkin Railroad Company and its successors, for right of way, yards, depots, side tracks, and other railroad purposes the following described real estate," and then follows a description of the property, after which is the following: "To have said several lots under the same tenor as if the same had been regularly condemned for right of way, depot, yards, side tracks, and other railroad purposes." The defendant railway company has never used the land for railroad purposes, "except a small portion thereof, on which the track of said defendant is located, and also the passenger station house and the agent's office." On another part of the land C. J. Clark "has, within the last seven years, without authority of plaintiffs, but under the direction and permission of said Seaboard Air Line Railway, erected a building to be occupied as a monumental workshop and storehouse, and also a woodyard for the sale of wood, all for his own private gain, without accounting to plaintiffs in any wise whatever." The prayer is that it be decreed that whatever rights the defendant railway company may have had to the property wrongfully occupied be forfeited, and that the title to said tracts be decreed to be in petitioners, free

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from all incumbrances; that possession be delivered to petitioners; that they have judgment against both the defendants for mesne profits for four years at \$60 per month; and that process issue. The defendants demurred to the petition, on the grounds that there was no cause of action, and that the plaintiffs were barred by the statute of limitation. The demurrer was sustained, and the plaintiffs excepted. Since the date of the certificate to the bill of exceptions Uriah B. Harrold, one of the plaintiffs, has died, and, on motion in this court, his heirs were made parties plaintiff in his stead.

Shipp & Sheppard, for plaintiffs in error.

E. A. Hawkins, for defendants in error.

BECK, J. (after stating the facts as above). The court below did not err in sustaining the demurrer to the petition in this case. The conveyance to the predecessor in title of the defendant railroad company contained the following stipulation: "To have said several lots under the same tenor as if the same had been regularly condemned for right of way, depot, yards, side tracks, and other railroad purposes." If we give to the stipulation in the conveyance the construction given to it by counsel for plaintiff in error—that is, that the grantees in the conveyance took only an easement in the land such as they would have acquired by condemnation proceeding—the conclusion that we have reached would not be affected thereby. The exact shape of the lot of land described in the deed and in the petition is not set forth so that the court can determine the shape of the entire tract, nor the relative position of the several lots which constitute the tract; and there is no map or plat contained in the record by which the shape of the tract could be determined with any degree of accuracy. But it is stated in the petition that the defendant company occupies "a small portion" of the land whereon "the track of said defendant is located, and also the passenger station house and the agent's office." We are not even informed in the petition as to whether that "small portion" of the land is segregated and inclosed so as to cut it off from the other parts of the land conveyed or not. The mere fact that the defendant company has not occupied and put into use all of the land conveyed, which is of the width of a little over 200 feet, as nearly as we can ascertain from the allegations in the petition, would not operate to work a forfeiture of the lands not used.

In the case of *Moss v. Chappell*, 126 Ga. 196, 54 S. E. 968, 11 L. R. A. (N. S.) 398, it appears that the deed to the railroad company, conveying the land in controversy, contained this provision: "Provided that should said strips of land cease to be used for railroad purposes, it shall revert to the grantors." And it was held that the words created a condition subsequent, a breach of which would work a forfeiture. The deed under consideration

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in the present case contains no such stipulation as that which we have pointed out in the deed under construction in the Moss Case. In the case of Mayor, etc., of Macon v. E. Tenn. Va. & Ga. Ry. Co., 82 Ga. 501, 9 S. E. 1127, and Ga. Railroad Co. v. Macon, 86 Ga. 585, 13 S. E. 21, it was held that if the railroad companies, which were parties to those cases, "had any right to the lands mentioned, it was by reason of accepting the grant on the terms fixed by the city council of Macon, and this must have been with the limitation that the estate acquired was to exist only so long as the property was used for the purposes specified," and that "such a limitation is distinguished from an ordinary condition subsequent, inasmuch as it marks the limits or boundaries beyond which the estate conveyed could not continue to exist." But in the deed which we have under consideration in this case there are no words of limitation nor words importing a condition subsequent, but the grantees in the deed acquired such an interest in the property, according to the plaintiffs' own construction of the deed, as would have been acquired by it under condemnation proceedings; and the mere failure upon the part of the railroad to use every part of the land thus acquired does not work a forfeiture, and the plaintiff would not be entitled to recover against the railroad company upon the grounds that it had forfeited its right and title to the lands conveyed.

As against the defendant Clark, the plaintiff did not show a good cause of action, as the petition does not show what portion of the land was in the possession and occupation by Clark, nor that he had been in such occupation for any length of time. We do not now pass upon the question as to whether or not, if a part of the land described in the deed had been segregated and actually divided from those portions used and occupied by the defendant company for railroad purposes, and the part so segregated and divided off had been entirely diverted from the purposes in contemplation of the makers of the deed, a right of action would have arisen in favor of the grantor in the deed or his privies in estate as against the parties occupying the land so segregated from that used for railroad purposes.

In addition to what we have said above in upholding the judgment of the court, sustaining the demurrer to the plaintiff's petition, it may be observed that the petition in this case is brought to recover the entire body of land conveyed, including that portion which is in actual use and occupancy by the railroad company for railroad purposes; for it appears from the petition that the track of the railroad company is actually laid over a portion of the land. Certainly it cannot be contended that so much of the land as is actually occupied by the railroad company with its track and railroad buildings could be recovered on the ground that there was a forfeiture of that portion of the land so occupied and used by the defendant. And it would seem, even if they had a right to re-

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cover a portion of the land which had been diverted from the purposes and uses intended by the maker of the deed, that part of it which was recoverable should have been described in the petition, so that it would be capable of identification and segregation from that part which could not be recovered.

Judgment affirmed. All the Justices concur.

CHICAGO, M. & ST. P. RY. CO. v. DONOVAN.

(Circuit Court of Appeals, Eighth Circuit, February 27, 1908.)

[160 Fed. Rep. 826.]

Railroads—Injuries at Street Crossings in Railroad Yards—Reasonable Warnings.—Independently of any statute or ordinance upon the subject, it is the duty of a railroad company, when about to send a car over a recognized street crossing in its yards, to exercise ordinary care for the protection of persons who may be using, or about to use, the crossing as a place of travel by giving some reasonable warning of the approach of the car.

Same—Persons to Whom Warning is Due.—The duty just stated is one which the railroad company owes to all persons thus using the crossing, as a place of travel, or about to do so, whether they be strangers or employees.

Master and Servant—Master's Responsibility for Servant's Act Done in Accordance with Recognized, but Negligent, Practice in Master's Service.—When a negligent practice obtains such a recognized and long-established footing in the master's service that the conclusion is unavoidable that he either has knowledge thereof and acquiesces therein or has not exercised a reasonable supervision over the work of his servants, and one of them is injured by the act of another done in accordance with that practice, the master cannot avoid responsibility on the ground that the negligent act was merely that of a fellow servant.

Same—Assumption of Risk—Distinction between Ordinary and Extraordinary Risks.*—The rule that a servant assumes all the ordinary risks of the service in which he engages presupposes that the master

*For the authorities in this series on the question whether an employee assumes the risks from defective appliances, unsafe work place, or other dangerous conditions of the existence of which he has knowledge, or is chargeable with notice, see second foot-note appended to *Clippard v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107, where all those preceding it are collected; second foot-note appended to *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 28 R. R. R. 365, 51 Am. & Eng. R. Cas., N. S., 365; *Lapre v. Woronoco St. Ry. Co.* (Mass.), 28 R. R. R. 210, 51 Am. & Eng. R. Cas., N. S., 210; *Finley v. Louisville Ry. Co.* (Ky.), 27 R. R. R. 183, 50 Am. & Eng. R. Cas., N. S., 183.

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will perform all the duties cast upon him for the servant's protection, and therefore embraces such risks as are incident to the service where those duties are performed, and not such as arise out of the master's negligence. The latter are deemed extraordinary risks, and, under a recognized exception to the rule, are assumed by the servant, if the master's negligence is actually known to him, or is so plainly observable that he may be reasonably presumed to know of it, and he then voluntarily enters or remains in the service.

Riner, District Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Charles B. Keefer and *F. W. Root*, for plaintiff in error.

C. D. O'Brien (*R. D. O'Brien*, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. This was an action by Matthew Donovan against the Chicago, Milwaukee & St. Paul Railway Company to recover for personal injuries sustained by him in a collision with a freight car at a recognized grade crossing in the company's yard in the western suburbs of Chicago. The yard contained 10 or more parallel tracks extending east and west across a public street, and numbered consecutively from north to south. One of the company's freight trains, upon which Donovan was head brakeman, entered the yard in the early morning, while it was yet dark, and was backed in on track 6. To make the street clear for travel, the train was cut or parted at the crossing, the caboose and one or two cars being put on the east side and the other cars on the west side. The movement of the train was then at an end, but Donovan, before quitting the yard, was required to report at the caboose, which was 1,500 to 1,700 feet from his post at the head of the train. He was an experienced railroad operative, but had not been in that yard before. Whether there was a reasonably safe route to the caboose on the south side of the train, and whether it was reasonably open to him to walk along the north side between the train and track 5, are matters in respect of which the record is silent, save as he testified that some switching in the west or top end of the yard "blocked us so I had to walk down between tracks 2 and 3" on the north side. At all events, he took the north side, crossed over tracks 5, 4, and 3, then walked east between tracks 3 and 2 to the street, and then turned south along the street toward track 6 upon which the caboose was standing. The center of the street was planked, and he followed the planking. On track 4, from two to five car lengths west of the street,

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was an engine with a bright headlight facing the street, but that part of the yard was not otherwise lighted. The engine was about to move, or was moving, a car on track 5 toward the street by the process of staking, which, as there employed, is described in this way: An engine, with a stake attached at one end to its tender or tank, advances alongside the car, when the free end of the stake is swung outwardly into a socket in the rear corner of the car; the engine moves forward and pushes the car along by means of the stake, until the car attains sufficient momentum to carry it to its destination; then the engine stops, the pole drops to its side and the car continues on alone. While they are moving together, the front line of the car is about four feet in advance of the engine. As Donovan turned into the street and walked south he saw the engine and appreciated that it was about to move forward, or was doing so, but he could not see the car, because it was back of the diverging rays of the headlight; and for the same reason he could not see a switchman who was standing upon the rear end of the car. No flagman was at the crossing, no guard or signal light was on the front end of the car, and no effort was made to give a timely warning of its approach to persons who might be passing in the street, but in these respects the work was being done according to the usual and regular practice in that yard. One of the staking crew, who was corroborated and not contradicted, testified:

"There was no signal either by whistle or lantern or in any other way, or any notice given of that car going over the street. There never is. There was no watchman there at that time. * * * The engineer is watching towards the stakeholder back of the engine. * * * He is looking for a sign to know how far he is going to kick the car. His attention is towards the rear. * * * This work we were doing there at this time was done in the usual way, and we have done it that way all the time I have worked there. This stake that is used there is about six feet long. The car does not extend in front of the engine far enough so that the flare of the headlight would strike the corner or the head end of it. The front end of the car would be back of the flare of the headlight."

And another member of the crew testified:

"A man standing on that crossing looking towards the engine with its headlight burning could not see the car. * * * This car that was being staked would make a noise running down, but wouldn't overcome the noise of the engine. The engine would make a greater noise."

Donovan had never met with a practice of staking cars over a public street without giving some reasonable warning to persons who might be passing therein, did not know that such was the practice in that yard, and did not know, or have any reason to believe, that the engine on track 4 was engaged in staking cars. Thinking that the engine might be drawing a long train which

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would obstruct his approach to the caboose, unless he crossed to the otherside, and believing that he could safely take chances on crossing in front of the engine, he hastened along and passed over track 4 in safety, but when he stepped on track 5 he was struck and injured by the car which was being staked, then moving about 12 miles an hour. After he passed in front of the engine, one of the staking crew observed his perilous situation and called out a warning, but it came too late to be of any avail.

Such was the case made by the evidence, when the conflicts therein and in the inferences to be reasonably drawn from different parts of it are resolved in favor of the party prevailing at the trial. Of the complaint it is sufficient to say that it charged, in substance, that the plaintiff was lawfully passing along the street in going from one part of the yard to another, that he did not and could not see the car or perceive its movement, that the defendant negligently ran it across the street at a high rate of speed without giving any warning of its approach, and that this negligence was the cause of his injuries.

At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor on the grounds, first, that there was no evidence of actionable negligence on its part, and, second, that the evidence conclusively established contributory negligence on the part of the plaintiff. The request was denied, and the court, in the course of its charge, said to the jury, in substance, that it was the duty of the defendant, when about to stake the car over the street, to exercise ordinary care for the protection of persons who might be passing therein by giving some reasonable warning of the approach of the car; that the plaintiff, while passing along the street in going from one part of the yard to another, was as much entitled to this measure of protection as other travelers; and that, if his injuries were caused by a failure on the part of the defendant to exercise ordinary care by giving some reasonable warning of the approach of the car, and there was no contributory negligence on his part, he was entitled to recover. The jury returned a verdict for the plaintiff, judgment was entered thereon, and the defendant now assigns error upon the refusal of its request for a directed verdict, and upon that portion of the charge which declared that the plaintiff, while so using the street, was entitled to the same measure of protection, in the way of a reasonable warning, as other travelers.

At the outset it must be conceded that if the plaintiff, after seeing the engine, observing its proximity to the street, and appreciating that it was about to move toward the crossing, or was doing so, had been injured in attempting to pass in front of it, he would not be entitled to recover. And it must be conceded, also, that if the exercise of ordinary care on his part as he advanced along the street would have necessarily disclosed to him the presence and movement of the car, as was the situation in

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Chicago, Milwaukee & St. Paul Railway Co. v. Clarkson, 147 Fed. 403, 77 C. C. A. 575, and he had then been injured in attempting to pass in front of it, he would not be entitled to recover. In either event he would have been guilty of negligence directly contributing to his injuries. But neither concession covers this case. The plaintiff was not injured in attempting to pass in front of the engine; he could not see or hear the car which was advancing on the next track; and he did not otherwise have reason to believe that the engine was staking a car at the time. Or, stating the whole of it, he successfully avoided the only danger which was discoverable by a reasonable use of his senses, and sustained injuries from a danger which was not thus discoverable, and which he did not otherwise have reason to expect. Plainly, therefore, the evidence did not conclusively establish contributory negligence on his part. Chicago, Rock Island & Pacific R. Co. v. Sharp, 63 Fed. 532, 11 C. C. A. 337; Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186.

Several contentions are advanced in support of the assertion that there was no evidence of actionable negligence on the part of the defendant, one of them being also the basis of the exception to the instruction before mentioned. Independently of any statute or ordinance upon the subject, it was the duty of the defendant, when about to stake the car over the public street, to exercise ordinary care for the protection of persons who might be passing therein by giving some reasonable warning of the approach of the car. Chicago, Rock Island & Pacific Ry. Co. v. Sharp, *supra*; Harty v. Central Railroad Co., 42 N. Y. 468; Brown v. N. Y. C. R. Co., 32 N. Y. 597, 88 Am. Dec. 353; Illinois Central R. R. Co. v. Baches, 55 Ill. 379, 384; Dick v. Railroad Co., 38 Ohio St. 389, 396; Delaware, etc., Co. v. Converse, 139 U. S. 469, 473, 11 Sup. Ct. 569, 35 L. Ed. 213; 3 Elliott on Railroads, §§ 1156, 1158. The existence of this duty and its nonperformance are not seriously questioned, but the contention is made that it was a duty which the defendant owed to the ordinary traveling public, and not to one in its service, like the plaintiff. Some color is given to the contention by several cases in which there are general expressions seemingly making such a distinction between the ordinary traveling public and employees, but when these expressions are read in the light of the questions necessarily presented for determination, the cases in which they are found do not do more than to establish that crossing signals, however required, are designed for the protection of persons using or about to use the crossing as a place of travel, and not of those who are neither so using it nor about to do so, such as a man driving a team along a street parallel to the railroad, or an employee working on or near the track some distance from the crossing. There are also cases which seemingly reject such a distinction between the ordinary traveling public and employees (see Illinois Central R. Co.

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v. Gilbert, 157 Ill. 354, 367, 41 N. E. 724; *St. Louis, etc., Co. v. Eggmann*, 161 Ill. 156, 159, 43 N. E. 620; *East St. Louis, etc., Co. v. Eggmann*, 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400; *Pittsburg, etc., Co. v. Moore*, 152 Ind. 345, 350, 53 N. E. 290, 44 L. R. A. 638; *Baltimore & O. S. W. Ry. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Bluedorn v. Missouri Pacific Ry. Co.*, 108 Mo. 439, 446, 18 S. W. 1103, 32 Am. St. Rep. 615; *Louisville, etc., Co. v. Martin*, 113 Tenn. 266, 87 S. W. 418, 422); but independently of that, we are of opinion that the duty before stated was one which the defendant owed to all persons using or about to use the crossing as a place of travel, whether they were strangers or employees. And this conclusion is, as we think, sustained by these considerations: The crossing was part of a public street, and therefore was a recognized place of travel. One person had the same right to use it as another. The safety of one user was of the same public concern as that of another. And the danger to be avoided threatened all users alike. In short, the reasons for safeguarding travel in the streets applied with equal force to all travelers therein.

It is next contended that, as to the plaintiff, the failure to give a reasonable warning was solely the negligence of his fellow servants who were staking the car. But the contention is not well taken. The failure to give such a warning was not peculiar to that occasion, or merely a casual neglect of duty on the part of those who were staking the car, but was of frequent occurrence at the crossings in that yard, and was in accordance with what counsel for the defendant concede was "a recognized and long-established practice there." One of two conclusions is, therefore, unavoidable. Either the defendant knew of that practice and acquiesced, therein, or it neglected to exercise a reasonable supervision over the work of its servants in that yard. In either case its responsibility for the continued existence of that practice is so plain that the acts of its servants done in accordance therewith must, in legal contemplation, be regarded as if done with its sanction.

It is further contended that, as it was the recognized and long-established practice in that yard to stake cars over the street without giving some reasonable warning to persons passing therein, the plaintiff's injuries resulted from an assumed risk. But this contention is also untenable. The rule that a servant assumes all the ordinary risks of the service in which he engages presupposes that the master will perform all the duties cast upon him for the servant's protection, and therefore embraces such risks as are incident to the service where those duties are performed, and not such as arise out of the master's negligence. The latter are deemed extraordinary risks, and, under a recognized exception to the rule, are assumed by the servant, if the master's negligence is actually known to him, or is so plainly observable that he may be

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reasonably presumed to know of it, and he then voluntarily enters or remains in the service. *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Texas & Pacific Ry. Co. v. Swearingen*, 196 U. S. 51, 62, 25 Sup. Ct. 164, 49 L. Ed. 382. When the rule and its exception are applied to the case made by the evidence, as before recited, it is plain that the risk which resulted in the plaintiff's injuries was not assumed as an ordinary incident of the service, because it arose out of the defendant's negligence, and was not assumed as an extraordinary risk, because that negligence was neither known to the plaintiff nor plainly observable by him during the short time intervening between his entrance into the yard and the collision.

We think the motion for a directed verdict was rightly denied.

As the exception taken to a portion of the court's charge, before mentioned, merely presents in another form the contention that the plaintiff was not one of those to whom the defendant owed the duty of giving some reasonable warning of the approach of the car, it is sufficiently disposed of by what has already been said on that subject.

The judgment of the Circuit Court is affirmed.

RINER, District Judge, dissents.

TRAVIS v. KANSAS CITY SOUTHERN RY. CO.

(Supreme Court of Louisiana, June 22, 1908. Rehearing Denied June 29, 1908.)

[46 So. Rep. 909.]

Master and Servant—Injury to Servant—Evidence—Negligence.*—

Where a switchman was killed at night, as the result of a collision between cars being switched and other cars standing on the same track in the yards of a railroad, held, that the mere fact that the yards were not lighted did not constitute negligence on the part of the railway company, although it was shown that it was the practice of a number of railroads to light their switchyards.

Same—Assumption of Risk.*—Held, further that the deceased, an experienced switchman, must have known the situation, and therefore assumed the risk, although he was killed on the first night of his employment.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo:
Andrew Jackson Muriff, Judge.

*See preceding case, and foot-note.

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Action by Mrs. Anna B. Travis against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

See 44 South. 274.

Alexander & Wilkinson, for appellant.

Hall & Jack, for appellee.

LAND, J. This is a suit by Mrs. Anna B. Travis, suing for herself and her three minor children, to recover \$20,000 damages for the suffering and death of her husband, a switchman, alleged to have been killed through the negligence of the defendant company in not furnishing sufficient lights in its yards to enable its trainmen to perform their work in safety. There was a verdict and judgment in favor of the plaintiff for \$8,000, and defendant has appealed.

Travis was one of the crew engaged on a starlight night in switching freight cars in defendant's yards at Shreveport, La. The switch engine was pushing backwards three cars on one of the side tracks, and Travis was standing on the footboard of the tender. The other switchman was on the ladder of the rear car, and it was his duty to look out for obstructions and give proper signals. It was Travis' duty to repeat the signals to the engineer. The train was moving at a speed of from six to eight miles an hour. Suddenly it collided with some stationary box cars on the track. The force of the impact broke or displaced the draw-head of the box car, and caused the car to climb the tender, thereby crushing Travis in the hips and loins. The leading switchman did not see the cars on the track until too late to avert a collision. He testified that, before jumping, he signaled the engineer; but the latter swore that he did not see the signal.

Plaintiff's case is reduced to the contention that the defendant railway was guilty of negligence in not having its yards lighted sufficiently to enable its employees to see at a safe distance standing cars or other obstructions on the tracks.

The defendant railway has never lighted its switchyards, at Shreveport, Kansas City, or elsewhere. The evidence shows that, among the prominent railroads of the country, some do and others do not light their yards with electricity. It is not shown that a majority of the railroads follow this practice, which, we are bound to know, is of comparatively recent date. Railroads which use appliances of a kind in common use are not guilty of negligence. The rule is that, where the employer does what is commonly and generally done by persons or corporations in the same general line of business, he is not guilty of actionable negligence. Elliott on Railroads (2d Ed.) § 1274; *Towns v. Railroad Company*, 37 La. Ann. 634, 55 Am. Rep. 508. In operating an unlighted yard the defendant was doing what railroads had done

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from the beginning and what its experience of 10 years demonstrated could be done with comparative safety to its trainmen. During that long time no like accident had happened, and its switchman had been able to see obstructions on the tracks in time to prevent collisions disastrous to life or limb. Doubtless a well-lighted yard is safer than a yard not lighted; but the railroad was not bound to employ the best possible means and appliances. *Id.*

Plaintiff's counsel has produced no authority in point, and it seems that this is the first case in which has been presented the contention that the operation of an unlighted switchyard is negligence per se on the part of a railroad. We presume that accidents have heretofore happened in unlighted switchyards, and the absence of reported cases suggests that the lawyers consulted were of opinion that the injured party had no case, either because there was no negligence, or because the servant necessarily assumed the risk of an obvious danger. Although Travis started to work in the evening and was killed next morning, he as an experienced switchman, who had worked in both lighted and unlighted yards, must have known the situation, and therefore assumed the risk. *Dandie v. Railroad Co.*, 42 La. Ann. 689, 7 South. 792; *Moffet v. Koch*, 106 La. 379, 31 South. 40; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that plaintiff's suit be dismissed, with costs in both courts.

BREAUX, C. J., concurs in the decree.

ROWLEY v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, March 31, 1908.)

[115 N. W. Rep. 865.]

Railroads—Operation—Injuries to Licensees—Actions—Questions for Jury.—In an action for injuries caused by a truck on defendant's platform running down the platform and striking plaintiff, whether defendant's agent left a truck in a position on the platform where it could not start without it being moved by others held, under the evidence, for the jury.

Trial—Verdict—Special Verdict—Questions Submitted.—Under St. 1898, § 2858, as amended by Laws 1903, p. 617, c. 390. § 1, special verdicts must be rendered either when requested by either party before introducing testimony, or when the court in its discretion directs such a verdict, and in such cases the verdict must consist of answers to questions relating to controverted and material questions of fact put

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in issue by the pleadings, and should not be combined with the general verdict; but, where a general verdict is rendered, the court may submit to the jury any question in its discretion and need not submit questions on all the material issues, even if requested to do so by the parties.

Same—Requests for Special Findings—Form.—Where the court directed a special verdict, and not merely findings in connection with a general verdict, while defendant was entitled to submit questions on material issues of fact, the refusal of the questions submitted by defendant was not error, if the questions requested were substantially included in questions submitted by the court, since the form of the questions is largely in the discretion of the trial court.

Same.—In an action for injuries to plaintiff by defendant's agent having negligently placed a truck on its platform in such a position that it ran down the platform causing the injuries, where the court directed a special verdict under St. 1898, § 2858, as amended by Laws 1903, p. 617, c. 390, § 1, permitting the court to direct a special verdict consisting of questions relating to the material issues of fact, the court's refusal to submit questions requested by defendant, as to whether defendant's agent in the exercise of ordinary care placed the truck in a reasonably secure position, and the submission by the court in their stead of the general question as to whether defendant was guilty of any want of ordinary care resulting in plaintiff's injuries, was erroneous, though the court charged in connection therewith that defendant used ordinary care if it left the truck in a reasonably safe position where it would not start, since, where specific acts of negligence are charged and denied, a special verdict should contain specific questions covering the alleged negligent acts.

Railroads—Injury to Licensee at Station—Care Required of Railroad Company.*—While persons going upon a railroad platform upon business such as taking a train, accompanying a passenger, etc., are regarded as invited to use the platform, and as to them the company must keep its platform in a reasonably safe condition to prevent injury, a mere licensee must use the platform as he finds it; the company being under a duty only to refrain from intentionally injuring him.

Same—Customary Use of Platform—Care Required.*—Where a railroad has, by long acquiescence, licensed the public to use its sta-

*For the authorities in this series on the subject of the care due from the railroad company to persons, other than passengers, at stations, depots, or on other railroad premises, on business, see first foot-note appended to *Chicago, etc., Ry. Co. v. Pritchard* (Ind.), 28 R. R. R. 146, 51 Am. & Eng. R. Cas., N. S., 146.

For the authorities in this series on the subject of the duties and liabilities of a railroad company with respect to licensees and trespassers on its premises, see second foot-note appended to *Louisville & N. W. Co. v. Pendleton's Adm'r* (Ky.), 28 R. R. R. 213, 51 Am. & Eng. R. Cas., N. S., 213; foot-note appended to *Illinois Cent. R. Co. v. Lucas* (Miss.), 26 R. R. R. 41, 49 Am. & Eng. R. Cas., N. S., 41.

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tion grounds for ordinary travel, the company owes a greater degree of care to persons so using its grounds than to ordinary licensees, and must conduct its business over such licensed way with the ordinary care required to avoid injuries which may be anticipated under the circumstances, including the fact of the licensed use of its grounds.

Same—Actions—Instructions—Misleading Instructions.—In an action for injuries caused by a truck standing on defendant's platform running down the platform into a passing train by which it was thrown against plaintiff, while the company was bound to use ordinary care to prevent injury to persons using its station grounds where it had acquiesced in such use for a long period, an instruction that it was defendant's duty to keep a reasonably vigilant lookout to prevent injuries to such persons was misleading, as the phrase "vigilant lookout" is usually applied to the precaution required of trainmen in the operation of trains, and that question was not in issue.

Appeal from Circuit Court, La Crosse County; J. J. Fruit, Judge.

Action by Lettie May Rowley against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

This is an action to recover for personal injuries received by the plaintiff, a young woman 23 years of age, while walking upon the platform in front of defendant's station building at the village of Mather, Juneau county, Wis., at about 8:30 p. m. May 10, 1906. The village has about 100 inhabitants, and the railroad passes through it in a north-easterly direction, but will be treated for convenience as running north and south. The village clusters about the station. There is one street, called "Main Street," crossing the railroad track at right angles just north of the station, and upon the north side of the street just east of the defendant's right of way Dewey's general store is situated, which is the principal store of the village, and contains the post office. The station building stands on the right of way just south of Main street, and on the east side of the defendant's main track, and is a wooden building 36 feet in length north and south by about 20 feet in width. Between the station building and the main track is a wooden platform about 12 feet in width, slightly sloping toward the track, which extends from the south line of Main street south for a distance of about 60 feet. A cinder platform of the same width extends south from the end of the plank platform along the main track for a distance of 54 feet, and from the end of the cinder platform a cinder path runs south 220 feet to the water tank. The north part of the station building is used as a freight house, and has a large door six feet in width for the reception of freight opening on the platform. From the threshold of this door an inclined approach 6 feet in width runs down to

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the main platform, with a fall of eight inches in the 6 feet, so that the total fall from the door to the edge of the depot platform (a distance of 12 feet) is about 10 inches, of which 8 inches is in the first 6 feet. This incline also slopes to the right and left from the sides of the door. The depot platform and the cinder platform constitute the only walk, which is in the nature of a regularly constructed sidewalk in the village. A number of houses and buildings of various kinds front on the right of way and depot grounds, and for many years the depot platform and cinder walks, as well as the depot grounds in general, have been commonly used by the public in passing to these houses and buildings from Main street without objection by the defendant company. On the evening of the accident the plaintiff, with a young man as an escort, were walking for pleasure, and came upon the north end of the depot platform, and proceeded south the entire length of the wooden platform as well as the cinder platform and cinder path, and then returned. As they were returning, a freight train passed them going north, and as they were at a point upon the wooden platform just north of the large freight house door a large two-wheeled baggage truck ran down the incline towards the train, was struck by the train, and thrown against the plaintiff, hurling her violently against a stove which had arrived by freight and stood upon the platform near the northwest corner of the station building. There was no direct evidence tending to show in what manner the truck came to be in such a position that it would make this movement. No one was operating it at the time, and apparently it stood somewhere upon the incline, and the jar of the passing train put it in motion. The plaintiff in her complaint alleged two grounds of negligence: (1) Negligent operation of the train at an unreasonable rate of speed; and (2) negligent placing of the truck in a position so close to the track that it came in contact with the train. But there was no evidence to support the first ground of negligence charged, and the second ground was the only one litigated. A motion to direct a verdict in favor of the plaintiff was overruled, and the court of its own motion submitted a special verdict to the jury which with the answers is as follows: "Q. 1. On and prior to the 10th of May, 1906, were grown people and children in the village of Mather accustomed continuously and frequently to pass and repass on foot for a considerable time, without objection or with acquiescence on the part of the defendant railway company, over and across the plank platform in question from the northerly and southerly ends, respectively, of such platform along a path or way running and being near the easterly side of the company's railway track? A. Yes. Q. 2. If you answer question No. 1, 'Yes,' then for how many years immediately prior to May 10, 1906, had such footway

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travel across and on said plank platform and the path or way leading from the respective ends of such platform been continued? A. 21 years. Q. 3. If you answer question No. 1, 'Yes,' then was the defendant railway guilty of any want of ordinary care which proximately caused the injury to the plaintiff? A. Yes. Q. 4. If you answer question No. 3 'Yes,' then was such failure to exercise ordinary care on the part of the defendant the proximate cause of the plaintiff's injury? A. Yes. Q. 5. If the court shall finally determine that the plaintiff is entitled to recover, at what sum do you assess her damages? A. \$3,000." A motion to set aside the verdict and for a new trial was granted, unless the plaintiff remitted the sum of \$1,000 from the damages, which the plaintiff did, and judgment for \$2,000 and costs was rendered, from which defendant appeals.

C. E. Vroman and *Veeder & Veeder*, for appellant.

J. T. Dithmar, for respondent.

WINSLOW, C. J. (after stating the facts as above). 1. The first contention made is that a verdict for defendant should have been directed, because the proof was undisputed that the truck was left by its employee in a perfectly safe position. The defendant had but one employee at the station, one De Long, who combined the functions of freight and passenger agent and baggage master. He testified that about half an hour before the accident he had taken the truck into the freighthouse, and unloaded therefrom three or four sacks of oats, and had then brought it out and put it between the stove standing on the platform and the west side of the freighthouse, just north of the door. In this position it could not have rolled down the platform, because it would first have to move to the south and up the incline, which would be impossible. De Long further says that he then went into the office of the depot, and remained there continuously until the accident happened, and that he authorized no one to touch it. Three young men named Parker, Griffin, and Caylor came over to the platform from Dewey's store about five minutes before the train came in, and walked south down the platform. Parker testified that as he passed the depot he noticed the truck behind the stove in the place where De Long testifies he put it. On the other hand, Griffin testified that he noticed the truck standing in front of the big door pointing towards the main track, and just about far enough from the track so that a person could walk nicely between the handles and the edge of the platform. Caylor testified that he saw no truck, that there was no truck in the path pointing towards the track nor between the stove and the track. One Nichols testified that he was walking up the track from the south, that the train passed him, and, when he was about 50 feet from the south end of the depot, he saw the truck start out from

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the depot and run straight out towards the train, and that it either struck the girl or the train. The plaintiff and her escort (one Strait) both testified that they saw no truck, but, as they walked back and had just passed the freighthouse door, they heard a noise, and the truck came running down the incline, struck the train, and then struck the plaintiff from behind, throwing her against the stove. This is substantially all of the evidence concerning the manner in which the accident happened. Parker testified, further, that two boys were running and playing about the stove when he passed, but there was no evidence that they did anything to the truck. The situation of the evidence must be conceded to be unsatisfactory, but certain physical facts are undisputed. The truck did run down the incline and strike the train. It could not have done so unaided if left behind the stove. No one was seen to move it. De Long was the last person shown to have touched it. In view of these admitted facts and in view of Griffin's positive testimony that the truck stood in front of the door and pointed toward the train as he passed, we think the question whether De Long left it there was fairly a question for the jury notwithstanding his statement that he left it behind the stove.

2. After the court announced, at the conclusion of the evidence, that a special verdict would be submitted to the jury, the defendant requested the submission to the jury of two questions as a part of the special verdict. The first of these questions asked whether the truck was placed by De Long in a reasonably secure position, so that it could not of its own volition run down the incline and collide with the train; and the second asked whether De Long in the exercise of ordinary care placed and left the truck in a reasonably safe position. The court refused to incorporate either question in the verdict, deeming the matter fully covered by the third question, and this ruling is assigned as error. Neither party requested the submission of a special verdict, but the court in the exercise of its discretion directed one to be taken. It will be seen by examination of the first clause of section 2858, St. 1898, as amended by section 1, c. 390, p. 617, Laws 1903, that special verdicts are to be rendered in two contingencies: First, when requested by either party before he introduces any testimony; and, second, when the court in its discretion directs such a verdict. In either case the verdict is a true special verdict, and must consist of questions relating to controverted and material questions of fact put in issue by the pleadings, and should not be combined with a general verdict. *Ward v. C., M. & St. P. Ry. Co.*, 102 Wis. 215, 78 N. W. 442; *Baxter v. C. & N. W. Ry. Co.*, 104 Wis. 307, 80 N. W. 644; *Schaidler v. C. & N. W. Ry. Co.*, 102 Wis. 564, 78 N. W. 732; *Sladky v. Marinette L. Co.*, 107 Wis. 250, 83 N. W. 514; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W.

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816; *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900. It will also be seen by reference to the third clause of said section 2858 that, where no special verdict is requested by the parties or directed by the court, the court has the power to submit to the jury any particular question or questions of fact in addition to their general verdict, and in such case it is a matter wholly within the discretion of the trial court to determine what questions of fact should be so submitted, and the failure to include in such special questions all the material issues of fact, even if requested by the parties, will not be ground of error. *McDougall v. Ashland S. F. Co.*, 97 Wis. 382, 73 N. W. 327; *Carroll v. C., B. & N. Ry. Co.*, 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872.

In this case the court directed a special verdict, not findings of fact in connection with a general verdict; and hence the rule that the questions submitted must relate to and cover the controverted and material issues of fact made by the pleadings applies with the same force as though one of the parties had in due time requested a special verdict. When the court announced its purpose to take a special verdict, the defendant's counsel submitted to the court, as he properly might, two questions which in his opinion related to material issues of fact in the case, and were proper to be included in the special verdict. Conceding that the questions did cover such material issues, it would not be error to refuse them in the form requested, provided the court sufficiently covered them in questions of its own framing; for, as has been frequently said, the form of the questions is largely in the discretion of the court. Now, the basic and fundamental act of negligence on which the plaintiff's case was founded, and which was denied by the answer, was the negligent placing of the truck by defendant's employee on the station platform in such a position that the passing train struck it and hurled it against the plaintiff. The questions submitted by the defendant plainly called attention to this basic issue of fact, but the court submitted, instead thereof, simply the general question whether the defendant was guilty of any want of ordinary care which proximately caused the plaintiff's injury. This general question was, of course, one of the ultimate questions of combined fact and law upon which the case depended. It covered the question whether De Long negligently left the truck on the incline, but it covered it in much the same way that a general verdict would cover it. It is true that the court charged, in substance, in connection with the third question that, if the jury believed that De Long in the exercise of ordinary care left the truck in a reasonably safe position where it would remain of its own weight, then the defendant exercised ordinary care; and it is claimed that by the giving of this instruction the error, if error there was, in refusing to submit the basic question of fact, was cured or became nonprejudicial.

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This court has several times held that, where specific acts of negligence are charged by the complaint, denied by the answer, and litigated on the trial, a special verdict should contain specific questions covering these alleged acts, and that the submission of a general question simply asking whether the defendant was guilty of want of ordinary care which proximately caused the plaintiff's injury is not a compliance with the special verdict statute, and will be error at least where the proper specific questions are requested. *Lee v. C., St. P., M. & O. Ry.*, 101 Wis. 352, 77 N. W. 714; *Bigelow v. Danielson*, 102 Wis. 470, 78 N. W. 599; *Schrunk v. St. Joseph*, 120 Wis. 223, 97 N. W. 946; *Olwell v. Skobis*, 126 Wis. 308, 105 N. W. 777. The reason is quite plain. The statute contemplates the right of the party to a separate finding of the jury upon each such specific question of fact. It is the duty of the court to administer the statute, so that the result aimed at be attained. If the court may refuse to submit such specific questions and simply submit the general question of negligence, then the statute is practically eliminated from the statute book, and in every negligence case two or three general questions covering simply ultimate conclusions of fact and law, and amounting to but little more than a general verdict, will take the place of the findings of specific fact contemplated by the statute. We hold, therefore, in this case that the court erred in not submitting some appropriate questions calling upon the jury to determine whether De Long left the truck in a reasonably safe position upon the platform, and, if he did not, whether his failure so to do was a lack of ordinary care which proximately caused the plaintiff's injury.

3. In submitting the third question the court charged the jury that, if they answered the first question, "Yes," then they were to consider the third question; that the care required of the defendant under the circumstances was simply ordinary care; but that it was the duty of the defendant to exercise increased prudence and caution in operating its railroad at and in front of the depot and to keep a reasonably vigilant lookout to prevent injury or accident to a licensee such as the plaintiff while crossing over the platform. The giving of this instruction is assigned as error, and it is said that the jury were told by it that the defendant owed the plaintiff the duty of exercising more than ordinary care in the conduct of its business in case it had licensed the public to use the platform for a walk. The court followed this instruction by this sentence: "However, the duty required by the defendant to the plaintiff if you have answered question 1, 'Yes,' is that of ordinary care under all the circumstances of the situation"—and gave further instructions tending to emphasize the idea that ordinary care was the only degree of care required. Whether the instruction should be held erroneous on

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this ground in view of the frequent statement that ordinary care alone is required may be doubtful, but we are clearly of the opinion that it was erroneous on other grounds. All persons who go upon a railroad platform upon business, such as the taking of a train, the meeting or accompanying of a friend who is expected to come upon or take a train, as well as the transaction of freight business, are regarded as invited to use the platform, and as to all such persons the duty of the company is to construct and maintain its platform, so that it shall be reasonably safe both as to access, use, and departure from it. A mere licensee, however (and in this case there is no claim that the plaintiff was more than a mere licensee), must take the platform as he finds it. He enjoys his license subject to the perils that may be there, and the company owes him no greater duty than to refrain from active or intentional wrong. *Dowd v. C., M. & St. P. Ry. Co.*, 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917. But it is equally well established in this state that, where a railroad company has by long acquiescence licensed the public to use its station grounds for ordinary travel and passage to and fro, the company must conduct its business over such licensed ways with ordinary care to prevent injury to such licensees, and that the rules of ordinary care in such cases require a greater measure of vigilance than would be required at a place where no such license had been given. *Townley v. C., M. & St. P. Ry. Co.*, 53 Wis. 626, 11 N. W. 55; *Mason v. C., St. P., M. & O. Ry.*, 89 Wis. 151, 61 N. W. 300. Ordinary care in such cases will be that degree of care which is reasonably adequate to meet and avoid the dangers which ought to be anticipated under all the circumstances, including the fact of the licensed use. *Carmer v. C., St. P., M. & O. Ry. Co.*, 95 Wis. 513, 70 N. W. 560. So, while the licensee must take the licensed grounds or platform as he finds them, and cannot predicate negligence upon defects therein, he is entitled to expect that defendant will exercise ordinary care in view of all the circumstances in the operation of its business at and about the licensed ways. While most, if not all, of the cases involving the rights of licensees under such circumstances have been cases where the licensee was injured by the alleged negligent movement of cars or engines, no good reason is perceived why the same rule of ordinary care should not logically apply to the alleged negligent operation of a freight or baggage truck upon the licensed ground or platform, as the movement of the truck for railway purposes is equally a part of the operation of the railroad business. Thus in the present case it would be entirely proper to say that the defendant's employees were required to use ordinary care in operating and placing the truck upon the platform in case the platform had become a licensed way, and that the measure of ordinary care would be

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greater than it would be had no license been given, and would be such as would be reasonably adequate to meet and avoid the dangers which ought to be anticipated in view of the licensed use.

Had this been the fair import of the charge as given, we should find no serious difficulty with it, but the sentence objected to requires the defendant to keep a reasonably vigilant lookout to prevent injury or accident to a licensee. The words "vigilant lookout" are almost universally used in reference to the lookout to be kept by train employees in the movement of a train; and we think would naturally be so understood by the jury. In the present case the claim that there was negligence in the movement of the train had been abandoned, and the only claim, in fact, litigated was the claim of negligence in the placing of the truck. In this respect, therefore, we think the instruction was well calculated to mislead the jury by leading them to believe that they might consider whether a sufficient lookout was kept by the employees of the freight train, when, in fact, no such element could properly enter into their deliberations.

Judgment reversed and action remanded for a new trial.

RIO GRANDE WESTERN RY. CO. v. BOYD.

(Supreme Court of Colorado, July 6, 1908.)

[96 Pac. Rep. 718.]

Railroads—Injuries to Animals—Actions—Questions for Jury.—In an action for the value of an animal killed at a railroad crossing, whether the engineer and fireman exercised the necessary care to ascertain if an animal were approaching the crossing held for the jury.

Appeal and Error—Review—Questions of Fact.—A verdict on conflicting evidence cannot be disturbed on review.

Railroads—Injuries to Animals—Actions—Presumptions and Burden of Proof.—That plaintiff suing for the value of an animal killed at a railroad crossing did not alone rely on the Stock Act, § 5 (Sess. Laws 1902, p. 25, c. 1), creating a presumption of negligence from the killing, in making his case, but also introduced evidence of negligence by the engineer and fireman, did not change the rule of burden of proof.

Same—Duty of Engineer.*—An engineer is not required to check the speed of his train merely because an animal may be near the track, unless there is something to indicate that it may go on the track.

Same.—Where a train was running at a high rate of speed, and

*See foot-note appended to *Hansberry v. Chicago, B. & Q. Ry. Co.* (Neb.), 26 R. R. R. 731, 49 Am. & Eng. R. Cas., N. S., 731.

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would take but a few seconds to traverse a quarter of a mile, and, when the train was that distance from the crossing at which an animal was killed, the animal must have been near and walking toward the crossing, and, if so, could have been seen by the engineer or fireman, there was sufficient to apprise them that there was danger of the animal going on the crossing.

Evidence—Opinion Evidence—Admissibility.—In an action for the value of an animal killed at a railroad crossing, a witness was properly permitted to state how far from the crossing he could see an animal in the highway approaching it, as against the objection that it called for the opinion of the witness on a matter as to which the jury could as well draw its own conclusion.

Railroads—Injuries to Animals—Action—Evidence—Sufficiency.—In an action for an animal killed at a railroad crossing, evidence by plaintiff that he could not give the name of the person on whom he served notice that the animal had been killed, but that he answered as the ticket agent of the railroad company at its depot, was sufficient to establish that the person served was the ticket or station agent of the railroad company, so as to meet the requirement of Stock Act, § 6 (Sess. Laws 1902, p. 25), providing for notice to the ticket or station agent of the railroad company.

Trial—Instructions Covered by Those Given.—Requested instructions are properly refused where covered by instructions given.

Railroads—Injuries to Animals—Contributory Negligence of Owner.—Where an engineer and fireman by the exercise of proper care could have discovered an animal at a crossing and slackened the speed of the train in ample time to have prevented killing it, their negligence was the proximate cause of the killing, and whether the owner was guilty of contributory negligence in turning the animal out on the highway in such close proximity to the crossing was not involved.

Appeal from Mesa County Court; Walter S. Sullivan, Judge.

Action by William Boyd against the Rio Grande Western Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sutherland and Van Cott & Allison (Wm. N. Vaile, of counsel), for appellant.

Henry H. Rhone, for appellee.

GABBERT, J. This is an appeal by the Rio Grande Western Railway Company from a judgment in favor of appellee for the value of a cow belonging to him which was killed by the railroad company. The basis of the claim of appellee is that the cow was killed by the negligence of the employees of the company.

Section 5 of the stock act (Sess. Laws 1902, p. 25, c. 1) pro-

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vides: "The killing or injury of any animal or animals by a railway company or corporation shall be prima facie evidence of the negligence of said railway company. * * *" The railroad track at the point where the cow was struck runs nearly east and west. The plaintiff lives about 200 yards north of the track. In front of his house, running north and south, is a wagon road, which crosses the railroad track approximately at right angles. It was on this crossing where the cow was struck by a train approaching from the west. There is no question but that the cow was killed by being struck by a locomotive operated by the defendant company, but counsel for the railroad company contend that the evidence is insufficient to support the verdict and judgment rendered thereon, in that the prima facie case made by plaintiff by showing that the cow was struck by the engine was overcome by evidence which established that the defendant company was not guilty of negligence. It is true that the testimony of the engineer and fireman operating the train is to the effect that they did not see the cow until she stepped upon the crossing; that at this time the engine was not more than fifty feet from her; that the train was running at the rate of about fifty miles an hour on a slightly downgrade, and that it was impossible to have stopped the train under about a quarter of a mile; and that, on account of obstructions along the highway over which the cow traveled to reach the crossing, it was not possible for them to see her until she stepped upon the track. But this testimony was contradicted by testimony on behalf of the plaintiff, which was to the effect that an animal the size of a cow could have been seen by the engineer and fireman within half or three-quarters of a mile of the crossing at any point on the wagon road between four hundred feet north of the crossing, and the crossing. In this state of the evidence it was for the jury to determine whether or not the fireman and engineer had exercised the necessary degree of care to ascertain if an animal were approaching the crossing over which the locomotive would shortly pass. Had there been no testimony offered on behalf of the plaintiff except that which established that the cow had been struck by the engine, then the testimony on behalf of the defendant company would have been sufficient to have overcome the prima facie case made by the plaintiff by virtue of the provisions of the statute quoted; but, as we have pointed out, the testimony introduced by the defendant to show that the killing of the cow was not caused by the negligence of the company was contradicted by direct and positive evidence that its employees were negligent; and, as this conflict was resolved by the jury in favor of the plaintiff, it cannot be disturbed on review.

Counsel have presented an interesting argument on the sub-

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ject "Burden of Proof," which, however, we do not think it is necessary to consider further than to say that the burden of establishing negligence of the defendant was upon the plaintiff, and there being a conflict in the testimony tending, on the part of the plaintiff, to directly prove acts which could constitute negligence of the defendant at common law, and on behalf of the defendant that its employees were not negligent, it was for the jury to determine which witnesses testifying on the subject were telling the truth, and render a verdict accordingly. It appears that plaintiff did not rely upon the statute alone in making his case in chief, but, in addition to proving that the cow was killed by being struck by the engine, introduced evidence to affirmatively establish the negligence of the engineer and fireman in operating the train; but this does not in any manner change the rule of the burden of proof in the case at bar. Plaintiff in making his case in chief could rely upon the statute, and introduce only such evidence as was necessary to make a *prima facie* case of negligence against the defendant thereunder, or he could prove such facts as at common law would constitute negligence on the part of the defendant. *Colo. Central R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542. By pursuing the latter course, and the defendant having introduced evidence to prove that the engineer and fireman were not negligent, the case stood for the jury to determine who was to be believed. True, as we have already stated, the burden rested with the plaintiff to establish the negligence of the defendant, but the jury, having determined from conflicting testimony that the engineer and fireman were negligent, has determined that the plaintiff sustained the burden which the law imposed upon him. Plaintiff was asked whether a person upon the track could see an animal approaching the crossing for any considerable distance. It is urged that this question was objectionable, for the reason that, even though the engineer might have seen the cow near the track, he was not obliged to slow down his train in anticipation that the animal would go on the crossing in front of the engine. Merely because an animal may be near the track of a railroad does not require an engineer to check the speed of his train, unless there is something to indicate that the animal may go upon the track. *Milburn v. H. & St. J. Ry. Co.*, 21 Mo. App. 426; *Young v. H. & St. J. Ry. Co.*, 79 Mo. 336; *N. O. R. R. Co. v. Bourgeois*, 66 Miss. 3, 5 South. 629, 14 Am. St. Rep. 534. In the present case the jury necessarily found from the testimony that the cow of plaintiff could have been seen by the engineer or fireman when the engine was upwards of half a mile distant from the crossing. The train was running at a high rate of speed. It would take it but a few seconds to traverse a quarter of a mile. When the train was that distance from the crossing, the cow must have been

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near and walking toward it; so that in the circumstances of this case there was sufficient to apprise the engineer and fireman that there was danger of the cow going upon the crossing. A witness on behalf of plaintiff was asked how far west of the crossing he could see an animal in the highway approaching it. This question was objected to because it is claimed that it calls for the opinion of the witness upon a conclusion that the jury should come to for itself from all the testimony concerning the topography of the country at the crossing. The objection is not tenable. True, the jury could determine from the evidence relating to the elevation of the track and the highway and other matters bearing upon the topographical surroundings from what distance west of the crossing an animal could be seen on the highway, but that was not the only competent testimony from which to determine this question. The distance an animal could be seen at or near the crossing from a point on the track west of the crossing was a fact to which a witness could testify who was familiar with the surroundings.

The stock act requires that the owner of an animal killed by a railroad company shall within a specified period deliver a notice to the ticket or station agent of the railroad company. It is urged by counsel for the railroad company that the evidence on behalf of the plaintiff that such notice was delivered is not sufficient to establish that the person to whom it was delivered was the ticket or station agent of the railroad company. We do not think there is any merit in this contention. Plaintiff testifies that he could not give the name of the man on whom he served the notice, but that he answered as the ticket agent of the defendant company at its depot in Grand Junction.

Other errors are assigned to the rulings of the court upon the admission of testimony which are so clearly without merit that it is not necessary to discuss them in detail.

Errors are assigned upon the instructions given. So far as such instructions are concerned, we think it is sufficient to say that in our opinion the case was fairly submitted to the jury upon the issues which it was their peculiar province to pass upon and determine. The instructions requested and refused appear to have been embraced in those given. Consequently there was no error in such refusal.

The final question to consider relates to the contention of counsel for defendant that plaintiff was guilty of contributory negligence in turning his cow upon the highway or common in such close proximity to the railroad track or crossing where she was killed. We do not think this question is involved. From the testimony, in view of the verdict of the jury, it appears that the employees of the defendant company, by the exercise of a proper degree of care upon their part, could have discovered

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the cow and slackened the speed of the train in ample time to have prevented a collision at a public crossing. In such circumstances it was their negligence which was the proximate cause of the collision; and hence the alleged antecedent negligence of plaintiff is not involved.

The judgment of the county court is affirmed.
Affirmed.

STEELE, C. J. and CAMPBELL, J., concur.

CHERRY *et ux.* v. LOUISIANA & A. RY. CO.

(Supreme Court of Louisiana, April 27, 1908. Rehearing Denied May 25, 1908.)

[46 So. Rep. 596.]

Railroads—Accident at Crossing—Precautions.—Where, by leaving cars near or upon a public crossing, a railway company has obstructed the view and created an extra danger to travelers upon the crossing, it is bound in approaching the crossing to use extra precautions, as by a less amount of speed, or by increased warnings, or otherwise; and the fact that the crossing is upon the yard of the railway company makes no difference.

Same—Duty of Traveler.*—Where the distance across four railroad tracks is only 49 feet, a traveler about to cross the tracks exercises all due legal care and prudence if he stops and looks and listens before venturing upon the first track. He is not required to repeat the precaution with each of the tracks in succession.

Death—Damages.—The father and mother of two children, aged 6 and 10, are allowed \$12,000 damages for the suffering and death of the two children, resulting from the negligence of the defendant company.

(Syllabus by the Court.)

Appeal from Second Judicial District Court. Parish of Webster; Richard Cleveland Drew, Judge.

Action by John F. Cherry and wife against the Louisiana & Arkansas Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Henry Moore and White, Thornton & Holloman, for appellant.

Sandlin & Robertson and Stewart & Stewart, for appellees.

*For the authorities in this series on the subject of the duty of a highway traveler to look again for trains just before he attempts to cross railroad tracks, see foot-note appended to *Annapolis, etc., Ry. Co. v. State* (Md.), 25 R. R. R. 733, 48 Am. & Eng. R. Cas., N. S., 733.

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PROVOSTY, J. The plaintiffs sue the defendant railway company for the death of their two little boys, one 6 and the other 10 years old, who were killed upon the Cemetery street crossing of the defendant's railway in the town of Minden by being run over by one of the locomotives of the defendant company. Cemetery street is 40 feet wide, and crosses the yard of the defendant company. It runs east and west, and the tracks upon the yard run north and south. There are four of them—three side tracks and one main track. The two lads at about 2 o'clock in the day were going west upon Cemetery street in a one-mule wagon driven by their grandfather, Mr. Johnson. They were seated on the floor of the wagon at the tail end, facing back, with their feet dangling, while their grandfather and his 12-year old son were seated upon the spring seat in front. As Johnson approached the tracks, there was to his right, or north, and flush with the first track, and 20 feet from the crossing, a large warehouse obstructing his view in that direction, that is to say, in the direction from which the locomotive was coming. At the north end of this warehouse, about 500 feet from the crossing, was a planer mill, making the usual noises of such an establishment. When Johnson reached the first track, he stopped, looked, and listened. As he thus stood, with the head of his mule pointing west and within a few feet of the first track, there were cars obstructing his view on both sides of the crossing. On his right, or north, side there were the following: On the first track, some cars, 30 or 90 feet from the crossing; on the second track, some flat cars loaded with logs, beginning about 20 or 30 feet from the crossing; on the third track, that next to the main track, a long train of cars loaded with logs, beginning some 5 feet upon the crossing and extending a long distance north. The testimony conflicts as to the number of cars on the left of Johnson, or south of the crossing. According to Lee Griffin, whose testimony we have adopted in the matter of the number and location of these cars, there was but one car below the crossing, and it stood 20 or 30 feet or more from the crossing. Not seeing and not hearing anything, and thinking the way safe, Johnson ventured upon the tracks. The distance from the outer rail of the first track to the outer rail of the fourth track was 49 feet. He passed the first, second, and third tracks safely; but on the fourth track, on the other side of the long train of cars which stood upon the third track, a locomotive with tender was coming, and was so close to the crossing, when the mule and wagon appeared from behind the cars that stood on the third track, that a collision was inevitable. The locomotive was backing. Johnson says he did not hear it, and we can well believe the statement, as he would not otherwise have cast under its wheels his own life and the other precious lives in his keeping. His not hearing is accounted

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for by the fact that the planer mill to his right was making some noise, but more especially by the fact that the track was down-grade and smooth, and the locomotive had shut off steam 275 yards back, and was coming almost noiselessly; the only noise being the rumbling of the wheels.

The seriously contested facts in the case are as to the speed of the engine and as to whether the usual signals by bell and whistle were given.

The crew of the locomotive, and one witness who first saw it when within 30 feet of the crossing, say it was going at from 6 to 10 miles an hour; but, if by this is meant that it was not going faster than was usual upon the yard, the testimony stands in opposition to that of a large number of witnesses whose attention was attracted to it. These witnesses lived in the neighborhood of this yard, and were accustomed to the noises and movements upon it, and the speed of this particular engine would not likely have attracted their attention, if it had not been unusual; and the effect upon the wagon shows that the blow must have been quick and sharp. Every spoke was broken in the two hind wheels, where the wagon was struck. One witness, of more than 12 years' experience as a locomotive engineer, says that his attention was attracted to the engine by the rapidity of its exhaust; that it shut off steam about 275 yards from the crossing, and that he continued to observe it until it was about 75 yards of the crossing, and it was still going about 25 miles an hour. How far beyond the crossing the locomotive ran after the collision it is impossible to know definitely from the conflicting testimony.

The occupants of the wagon were hurled in the air and forward, how far is variously stated by the witnesses. Johnson was found senseless, but with no serious injury. His son was unhurt. The two other boys fell on the track and were run over. One had a hand and a foot cut off, and the other a leg; and both were otherwise wounded and severely bruised and lacerated. Both died before the next morning.

It is inconceivable that if the whistle was blown near enough to the crossing to serve for a warning, or if the bell was rung continuously, these signals would not have been heard by Johnson and by so many persons whose attention was attracted to this engine by its unusual speed. The theory that will best reconcile the conflicting testimony on these points is that the whistle was blown too far up the track to serve as a warning, and the bell was begun to be rung too near or too late.

Defendant has an elaborate argument with diagrams to prove that the smokestack of the locomotive protruded $1\frac{1}{2}$ feet above the long train of log piled-up cars on the other side of which the locomotive was coming, and that Johnson could have seen it. But the best proof that Johnson could not see it is that he stopped

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and looked and did not see it, although he had good eyes and was familiar with the crossing.

Defendant's learned counsel argue that Johnson stopped at the wrong place to look and listen; that he should not have stopped before going upon the first track, but should have waited until he had gone upon tracks 1, 2, and 3. We do not agree with that view. The four tracks were only 49 feet across. Johnson could see and hear just as well where he stopped as nearer to the fourth track, and had he gone upon the tracks and stopped there, and been injured, defendant would have been the first to construe his act into negligence.

We are satisfied that the true cause of the accident was the negligence of the employees of defendant in charge of the locomotive in not giving the proper warnings by bell and whistle, and in coming upon this crossing, one of the most frequented of the town, at a negligent speed, especially in view of its obstructed condition from the cars standing upon and near it. The engineer frankly admitted on the witness stand that he did not know the cars stood so near the crossing, or, in other words, that the crossing was so obstructed or so dangerous. This engineer, by the way, was a mere fireman, with very little experience in running engines, who had taken charge that very day in the absence of the regular engineer on leave. The same fireman acting engineer, was discharged twice for negligence between the date of this accident, May, 1906, and the date of the trial, June, 1907.

By leaving these cars so near the crossing and obstructing the view, defendant increased the danger, and thereby assumed the duty of taking extra precautions for guarding against accidents. *Eichorn v. N. O. & C. R. L. & Pr. Co.*, 112 La. 237, 36 South. 335, 104 Am. St. Rep. 437.

Defendant not only took no extra precautions, but neglected even the ordinary ones. It ran this locomotive at extra speed and noiselessly on the other side of a train of cars, thereby laying a sort of trap, and gave imperfectly, if at all, even the ordinary signals of bell and whistle.

One who, on a public highway, approaches a railroad track, and can neither hear nor see any indication of a moving train, is not chargeable with negligence in assuming that there is none sufficiently near to make the crossing dangerous. *Tabor v. Mo. Valley R. R. Co.*, 46 Mo. 353, 2 Am. Rep. 517; *Kennayde v. Pac. R. R. Co.*, 45 Mo. 255. See, also, *Correll v. B., C. R. & M. R. R. Co.*, 38 Iowa, 120, 18 Am. Rep. 22, and *Pennsylvania R. Co. v. Webster*, 76 Pa. 157, 18 Am. Rep. 407; *Louisville, etc., R. R. Co. v. Commonwealth*, 13 Bush (Ky.) 388, 26 Am. Rep. 205.

Plaintiffs claim damages as follows: For the great shock to them, and for their pain, sorrow, anguish, and distress, \$10,000;

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for deprivation of comfort, society, companionship, and assistance of their boys, who were their only children, \$10,000; for the pain, torture, and anguish suffered by the boys, and which they inherit from them, \$15,000; punitive damages, \$10,000—total, \$45,000. The jury allowed \$30,000, without specification of what they made the allowance for.

This case is not one for the allowance of punitive damages. *Parker v. Crowell & Spencer*, 115 La. 466, 39 South. 445. Touching the proper amount of damages to allow in a case of this kind we find no occasion for adding anything to what was said in the case of *Bourg v. Brownell-Drews Lumber Co.* (La.) 45 South. 972. In *Burchner v. City*, 112 La. 599, 36 South. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455, for the death of a child, this court allowed the parents \$6,000. A like amount for each of the children will in this case satisfy the ends of justice.

The judgment appealed from is reduced to \$12,000, and, as thus reduced, is affirmed. Plaintiffs to pay costs of appeal, and defendant those of lower court.

CARRAHAN v. BOSTON & N. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Essex, May 20, 1908.)

[85 N. E. Rep. 162.]

Street Railroads—Persons Driving towards Track—Motorman's Duty.*—When a motorman sees one driving towards the track, so that if both pursue their course a collision will ensue, he must stop his car, though the driver ought not to proceed.

Same—Collision—Action for Injury—Questions for Jury.—In an action for injury caused by a street car striking a wagon, whether the motorman was negligent and plaintiff was guilty of contributory negligence, held, under the evidence, questions for the jury.

Same—Duty of Driver.†—One, in attempting to drive across street railway tracks, should use due care to see whether he can cross safely.

Municipal Corporations—Streets—Rights of Travelers.—One of two persons driving in a street, who, in pursuing his course and not increasing his speed, will naturally reach an intersecting point before

*For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Birmingham Ry., etc., Co. v. Jones* (Ala.), 27 R. R. R. 781, 50 Am. & Eng. R. Cas., N. S. 781; first foot-note appended to *South Covington, etc., Ry. Co. v. Cleveland* (Ky.), 26 R. R. R. 143, 49 Am. & Eng. R. Cas., N. S. 143; second foot-note appended to *Powers v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 251, 46 Am. & Eng. R. Cas., N. S. 251.

†For the authorities in this series on the question whether the stop, look, and listen rule is applicable to street railway crossings, see foot-

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the other, has the right of way, and the other "ought" to give way to his rights, but is not bound to do so.

Street Railroads—Collision with Vehicles—Instructions.—In an action for injury caused by a street car striking a wagon, an instruction that one of two persons driving in a street, who, by pursuing his course and not increasing his speed, will naturally reach an intersecting point before the other, has the right of way, and the other must give way to his rights, was improper, as tending to lead the jury to believe that the fact that plaintiff was the first to reach the place of collision was decisive of his right to recover, whereas the decisive question was whether the accident was caused by the company's or his negligence.

Exceptions from Superior Court, Essex County, Lloyd E. White, Judge.

Personal injury action by Richard P. Carrahan against the Boston & Northern Street Railway Company. From a verdict for plaintiff, defendant brings exceptions. Exceptions sustained.

The following is a copy of the plat referred to in opinion: (omitted as nonessential).

Walter H. Southwick, for plaintiff.

Starr Parsons and *H. Ashley Bowen*, for defendant.

LORING, J. The story told by the plaintiff in this case is that on the afternoon of July 21, 1903, he was driving a heavily loaded, one-horse express wagon through South Common street in Lynn (shown on the accompanying plan), on his way from Boston to Nahant. The afternoon was a stormy one, with a pelting, driving, easterly rain full in his face. He had a canvass over his wagon, drawn up over a hood or shade which was over his seat. When he got to the end of the Common he looked to see if there was a car coming. He saw none, and drove to the drinking fountain to give his horse a drink. He then testified: "I looked around again and I could see down below the trees, there is trees at the end of the Common, probably 200 or 300 feet away from where I was. I should say 200 feet anyway, and then I proceeded on. I didn't see any car, so I started across in a direct

note appended to *Price v. Rhode Island Co.* (R. I.), 23 R. R. R. 249, 46 Am. & Eng. R. Cas., N. S., 249; *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; last foot-note appended to *Wolf v. City Ry. Co.* (Ore.), 27 R. R. R. 213, 50 Am. & Eng. R. Cas., N. S., 213; last foot-note appended to *Niemyer v. Washington Water Power Co.* (Wash.), 26 R. R. R. 496, 49 Am. & Eng. R. Cas., N. S., 496.

For the authorities in this series on the question whether a person has the right to attempt to cross street car tracks in front of a car which he sees approaching, see first foot-note appended to *Wolf v. City Ry. Co.* (Ore.), 27 R. R. R. 213, 50 Am. & Eng. R. Cas., N. S., 213.

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line right across Market Street and about 100 feet, 140 feet from the drinking fountain I struck the car track and I goes in the car track for about 15 feet, 10 or 15 feet, and when I was in there at that distance I heard the car coming from behind, so I tried to get the horse to go faster; I was going very slow." He tried to get out of the way, but before he succeeded in doing so the car "struck the hind wheel and threw the hind part of the wagon out and directly after that struck the forward wheel and threw that out, and about the same time it struck the horse and threw the horse down and it threw me in the back of the wagon."

It is admitted that "the plaintiff walked his horse from the drinking fountain till he got upon the car track and did not look back or listen after he left the drinking fountain."

Evidence was introduced by the defendant tending to show that the plaintiff was asleep; that the gong was sounded and he paid no attention to it, and that the car struck "in between the horse and the shaft near the hind part of the horse"; and that the plaintiff was not thrown off his seat. Some of the evidence introduced by the defendant corroborated that of the plaintiff as to the way he drove on to the car track, while other witnesses testified that the plaintiff "was driving a little ways parallel with the track and then swung across when the car was within 12 feet of him."

The motorman of the car in question testified that "at City Hall Square there was a covered team going in the same direction on an angle towards the track. When I first noticed the team I was about 30 yards in the rear. I immediately set my brake and rang my gong. My car was running at about 4 or 5 miles an hour just prior to this time. This team kept coming in towards the track and when I was about 10 feet from him I shouted and rang my gong harder, but he kept coming in toward the track and the front left-hand corner hit his right shaft."

It was also admitted that the plaintiff was thoroughly familiar with the locus and that there were four lines of electric cars running through City Hall Square, and 36 cars an hour went through the square at that time of day, "averaging less than two minutes apart."

A civil engineer called by the defendant testified that a motorman in the front end of an electric car coming from Boston as the car in question was coming would have a clear view of the scene of the accident for something like 1,300 feet, probably more.

The defendant asked for a ruling that as matter of law the plaintiff was negligent and the defendant was not. These were refused and exceptions were taken.

In the course of his charge the presiding judge told the jury that: "Ordinarily, where two men are driving vehicles upon

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the street, the one who, pursuing his course and not increasing his rate of speed or changing his direction, would naturally reach an intersecting point first, would naturally have the right of way, and the one who, not changing his rate of speed or his direction, would naturally reach such point last must give way to the rights of the one who would reach there first." To this an exception was taken.

1. The testimony of the motorman made out a complete case of negligence on his part, that is to say, on the part of the defendant.

When the motorman of a car sees a team ahead which is being driven in a straight line "coming in towards" the tracks so that if both keep on a collision will ensue, it is the duty of the motorman to stop his car if he sees that the driver of the team is going on, even if the driver ought not to go on. In place of that the motorman in the case at bar by his own testimony deliberately ran the plaintiff down. We are of opinion that no exception lies to the ruling by which the presiding judge left this question to the jury. *Glazebrook v. West End Street Railway*, 160 Mass. 239, 35 N. E. 553; *White v. Worcestor Street Railway*, 167 Mass. 43, 44 N. E. 1052; *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104, 61 N. E. 822.

2. The question whether as matter of law the plaintiff was guilty of contributory negligence is a close question. But on the whole we think that this also was a question for the jury.

In such a case as that now before us the law is settled. The difficulty lies in the line between what is and what is not negligence as matter of law in particular cases.

The plaintiff was bound to exercise due care in looking to see whether he could safely cross the track in question. See, for example, *Jeddey v. Boston & Northern Street Railway* (Mass.) 84 N. E. 316; *Stubbs v. Boston & Northern Street Railway*, 193 Mass. 153, 79 N. E. 795. See, also, *Sullivan v. Boston Elevated Railway*, 185 Mass. 602, 605, 71 N. E. 90.

The plaintiff admitted that he drove at a slow walk for 140 feet after looking before he entered on the tracks. If he personally was at the fountain when he looked, his horse's nose must have been some 10 feet or so nearer the rail, and when he testified that he looked when at the drinking fountain it does not necessarily mean that he was exactly opposite the center of it. And this testimony might fairly be taken to mean that he looked as he started to drive away from the fountain. The length of the plaintiff's horse and wagon is not given in the bill of exceptions. It may fairly be assumed to be about 20 feet. The result is that the jury were warranted in finding that he drove about 120 to 140 feet after looking, before his horse's nose crossed the nearer rail of the track in question. On paper that sounds like a long dis-

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tance. But to drive about six lengths of his team cannot (in our opinion) be said as matter of law to be too long a distance to drive without looking, under the circumstances of this case. In this case the course the plaintiff took when he left the drinking fountain and adhered to throughout, showed that he intended to cross the tracks. When this is taken in connection with the fact that the motorman could see the point where the collision took place for "something like 1,300 feet, probably more," we think that the question of the negligence of the plaintiff was for the jury, as in *Jeddrey v. Boston & Northern Street Railway* (Mass.) 84 N. E. 316, *Stubbs v. Boston & Northern Street Railway*, 193 Mass. 513, 79 N. E. 795, and *Sullivan v. Boston Elevated Railway*, 185 Mass. 602, 71 N. E. 90.

The case does not come within *Seele v. Boston & Northern Street Railway*, 187 Mass. 248, 72 N. E. 971. There, after driving three-quarters of a mile parallel and close to the defendant's tracks the plaintiff pulled sharp across them without looking to see if a car was close behind him.

It should be noticed that all the 36 cars an hour which went through City Hall Square did not come on the tracks here in question.

3. We are of opinion that the exception to the charge must be sustained.

If the word "ought" were substituted for the word "must" in the last line, the proposition stated would be correct as an abstract proposition of law.

But even then it would not have been proper to instruct the jury that the rights of the parties in the case then before the court depended upon that proposition.

From what has been said the question on which the rights of these parties depended was whether the accident was caused solely by the negligence of the defendant, that is to say, was caused by the negligence of the defendant if it was negligence, and was not caused by the contributory negligence of the plaintiff if he was negligent. It might well be that the plaintiff, if he had exercised due care, would have heard the defendant's gong before he did hear it and would not have gone on the track at all, or, if he had got on to it, that he would have driven off it in time to avoid a collision. The fact that the plaintiff was the first to get to the place on the tracks where he was struck was not decisive in the case at bar. The jury might well have understood the judge to tell them that it was.

Exceptions sustained.

PADUCAH TRACTION CO. *v.* SINE.

(Court of Appeals of Kentucky, June 16, 1908.)

[111 S. W. Rep. 356.]

Street Railroads—Collision with Vehicle—Care Required.*—A street railway company, while entitled to the use of its railway track on a street for the free passage of its cars, is also bound to use ordinary care to discover a vehicle also entitled to use the street, and to avoid injuring it or the persons therein in a collision.

Same—Contributory Negligence.—Plaintiff, the rear man on a covered ice wagon, was injured in a collision between the wagon and one of defendant's street cars. The cover extended beyond the step on the rear of the wagon, so that plaintiff could only see the track by leaning backward and around the cover. He testified that he did not see and could not discover the presence of the car until the wagon was on the track and the collision imminent, and that it was then too late for him to jump out of the way of the car, in which statement he was not contradicted, but was corroborated by the physical facts. Held, that plaintiff was not negligent.

Negligence — Imputed Negligence — Driver of Wagon.†—Where plaintiff, the rear man on an ice wagon, was injured in a collision with a street car, the negligence of the driver of the wagon would not be imputed to plaintiff, though they were fellow servants of the same master; the driver not being the agent or servant of plaintiff.

Same — Concurrent Negligence — Joint and Several Liability.‡—Where plaintiff's injury resulted from the joint or concurrent negligence of the driver of an ice wagon on which plaintiff was employed and of the motorman of defendant's street car, both defendant and the driver of the wagon were liable, and a recovery might be had against either.

*See preceding case, and foot-note.

†See second foot-note appended to *Eckels v. Muttschall* (Ill.), 28 R. R. R. 553, 51 Am. & Eng. R. Cas., N. S., 553; foot-note appended to *Nonn v. Chicago City Ry. Co.* (Ill.), 28 R. R. R. 532, 51 Am. & Eng. R. Cas., N. S., 532; last foot-note appended to *Louisville & N. R. Co. v. Armstrong* (Ky.), 28 R. R. R. 40, 51 Am. & Eng. R. Cas., N. S., 40; foot-note appended to *Cornovski v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 37, 50 Am. & Eng. R. Cas., N. S., 37.

‡For the authorities in this series on the subject of concurrent negligence, see second foot-note appended to *Holmes v. Missouri Pac. Ry. Co.* (Mo.), 27 R. R. R. 551, 50 Am. & Eng. R. Cas., N. S., 551; second foot-note appended to *Pittman v. Chicago & E. I. R. Co.* (Ill.), 27 R. R. R. 435, 50 Am. & Eng. R. Cas., N. S., 435.

For the authorities in this series on the subject of the joinder of tort-feasors as defendants, see last foot-note appended to *Hollins v. New Orleans & N. W. R. Co.* (La.), 28 R. R. R. 283, 51 Am. & Eng. R. Cas., N. S., 283; foot-note appended to *Hough v. Southern Ry. Co.* (N. Car.), 26 R. R. R. 759, 49 Am. & Eng. R. Cas., N. S., 759.

Paducah Traction Co. v. Sine**Street Railroads—Injuries to Travelers—Last Clear Chance. §—**

Where, in an action for injuries in a collision between a street car and an ice wagon on the rear of which plaintiff was employed as a delivery man, there was evidence that the motorman, notwithstanding the negligence of the driver of the ice wagon, by the exercise of ordinary care could have stopped the car in time to have prevented the collision, but failed to do so, such failure was negligence entitling plaintiff to recover against the railway company, whether the motorman's failure to stop the car was caused by his running it at too high a speed or on account of his not maintaining a lookout.

Trial—Giving Instructions—Time.—The giving of an additional instruction, after argument had been concluded, was not error for which a reversal would be ordered, where it appeared that such instruction was indispensable, and neither counsel asked to make a further argument on that account.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by William Sine, by next friend, against Paducah Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wheeler, Hughes & Berry, for appellant.

Hendrick, Miller & Marble, for appellee.

SETTLE, J. The appellee, William Sine, an infant, by a collision between an ice wagon and one of appellant's street cars, was thrown from the wagon to the railway track, and his leg so crushed by the wheels of the car as to necessitate its amputation. For the injuries thus sustained appellee, by next friend, sued appellant in the McCracken circuit court, alleging they were caused by the negligence of the motorman operating the car. Ten thousand dollars was the amount of the damages claimed. The answer traversed the petition, and, in addition, pleaded that appellee's injuries were caused by his own contributory negligence and the negligence of the driver in charge of the wagon. These pleas were denied by reply, and upon the issues thus made a trial was had, resulting in a verdict and judgment in appellee's favor for \$2,000. Appellant moved for a new trial, which was refused by the circuit court, and this appeal followed.

The collision occurred at the intersection of Jackson and South Third streets, in the city of Paducah. The ice wagon was the property of the Robertson Ice Company. Appellee and the driver of the wagon were employees of the ice company, and engaged

§For the authorities in this series on the subject of the "last clear chance" doctrine, see first foot-note appended to *Doherty v. Des Moines City Ry. Co.* (Iowa), 27 R. R. R. 477, 50 Am. & Eng. R. Cas., N. S., 477; first foot-note appended to *Smith v. Connecticut Ry. & L. Co.* (Conn.), 27 R. R. R. 201, 50 Am. & Eng. R. Cas., N. S., 201.

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in the business of delivering ice to its customers. The driver's place, of course, was at the front of the wagon, from which he controlled the mules drawing it. Appellee's post of duty was at the rear end of the wagon upon a footboard attached to and hanging down about a foot and a half from the bottom of the wagon bed. From this position he delivered ice from the wagon in such quantities as might be requested by purchasers. The ice wagon contained a heavy curtained top, or cover open at each end, the roof and sides of which extended back beyond the step, so inclosing it that appellee, in order to see any object on either side of the wagon, would have to hold to the wagon bed with one hand, and lean his body backward. On the occasion of the collision, the ice wagon in approaching the intersection of Jackson and Third streets was going from east to west on Jackson street, and the street car passing over Third street from north to south. As the wagon neared the railway track, there was a building on the corner which prevented the approaching car from being seen by the driver until the wagon reached the edge of Third street, and, if the street was 50 feet in width between pavements and the railway track was in the middle of the street and 8 feet wide, the wagon was within about 21 feet of the track before the driver could have seen the car. Appellee, however, was less favorably situated, as he was standing on the footboard at the back end of the wagon, and his view of the street in the direction of the coming car was obstructed by the side of the wagon cover, as well as the corner building. Both he and the driver testified that they did not see the car until the wagon got upon the railway track, though they claimed to have been keeping a lookout for a car at the time. Both also claimed to have first looked along the railway track south for a car and upon looking north only discovered, after getting on the track, the one by which the wagon was struck, but it was then too late to avert the collision. It further appeared from appellee's evidence that Jackson street was constructed of brick and the ice wagon in moving over it made a considerable noise, that the street car was running at an unusually high rate of speed, and that no effort was made by the motorman to give the usual signals of its coming, or to control or lessen its speed after he discovered or by ordinary care could have discovered the wagon, and that it was about to cross the track in front of the car. If appellant's motorman saw the wagon on the railway track or about to go upon it in time to have prevented the collision by stopping the car but for the high rate of speed at which he was running it, or if the collision was caused by his failure to maintain a proper lookout ahead of him, or his failure to sound the car gong in approaching Jackson street, in either of these events he was guilty of negligence which entitled appellee to recover; and there was evidence

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in appellee's behalf tending to prove negligence on the part of the motorman in one or more of these particulars.

Appellant introduced on its behalf considerable evidence to the effect that the car was not running at high or dangerous rate of speed, that the usual signals were given and a lookout maintained by the motorman, and that the driver of the ice wagon ought to have seen, and by the exercise of ordinary care could have seen and heard, the car from the time the wagon reached Third street and before going upon the track in front of it, and thereby have prevented the collision; but that he failed to exercise such care, and negligently drove upon the track when so near the car that it was impossible for the motorman to stop it in time to prevent the collision. Appellee and the driver of the ice wagon were lawfully upon the street occupied by appellant's car track, and had the right to use any part of it with the ice wagon, but in using the street it was their duty to exercise ordinary care to avoid a collision with appellant's car, and, while appellant was likewise entitled to the use of its railway track on the same street for the free passage of its cars, it was also its duty to use ordinary care to discover the ice wagon and avoid injuring it or persons in it. *Palmer Transfer Co. v. Paducah Railway & Light Company*, 89 S. W. 515, 28 Ky. Law Rep. 473; *Green v. Louisville Ry. Co.*, 84 S. W. 1154, 27 Ky. Law Rep. 316. The record furnishes very slight, if any, evidence of contributory negligence on the part of appellee. The great weight of it conduced to show the absence of such negligence. He testified that he did not see and could not discover the presence of the car until the wagon was on the track and the collision became an inevitable fact, and that it was then too late for him to jump out of the way of the car. No witness expressly contradicted this, and the statement was apparently corroborated by the physical fact that his position on the footboard prevented him from seeing the car until he got to or practically upon the track.

As already intimated, there was evidence on appellant's behalf to the effect that the driver of the ice wagon was guilty of negligence, though much of appellee's evidence conduced to prove that he was not. However, if it be conceded that the driver's negligence contributed to the accident, we do not regard it material in this case in view of the proof of the motorman's negligence. This is not an action of a servant against the master to recover for injuries resulting from the negligence of a fellow servant. Appellee and the driver, though fellow servants, in the employ of the Robertson Ice Company, sustained no such relation to each other as to the appellant in this case; nor should the negligence of the driver be imputed to appellee as he was neither his agent or servant. If appellee's injuries were caused wholly by the negligence of the driver, no right of recovery

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exists in his behalf against appellant, but, if they resulted from the joint or concurring negligence of appellant and the driver, both are liable therefor in damages, or a recovery may be had against either. On the other hand, if appellee's injuries were caused by the negligence of the motorman alone, appellant's responsibility therefor cannot be questioned. So, if it be admitted that the evidence in this case tends to show that the driver of the ice wagon was negligent in not discovering the approach of the car before driving upon the railway track, or in attempting to cross the track in front of the car, if, as the evidence strongly conduced to prove, appellant's motorman, notwithstanding such negligence on the part of the driver, by the use of ordinary care, could have stopped the car in time to have prevented its collision with the wagon, and failed to do so, such failure constituted negligence entitling appellee to recover of appellant the damages he sustained from the collision. And this would be true whether the motorman's failure to stop the car in time to prevent the collision was caused by his running it at a too rapid and dangerous rate of speed, or on account of his not maintaining a lookout ahead of the moving car. The doctrine fixing appellant's liability upon such a state of facts as here presented, if its contention as to the negligence of the driver of the ice wagon is allowed, is well stated in the case of *Kentucky and Indiana Bridge Co. v. Sydnor*, Adm'r, 82 S. W. 989, 26 Ky. Law Rep. 951, 68 L. R. A. 183, as follows: "McDowell was a fellow servant of decedent, Renfro, in repairing the car, it is true, but it does not follow from that fact that anybody in connection with McDowell could wrongfully injure or kill Renfro in that work and escape liability on the ground that the fellow servant, McDowell, aided in the wrongful act. Nothing is better settled than that, when two or more by their joint tort damage another, the joint tortfeasors are jointly and severally liable to the injured person for his entire damage. The doctrine of nonliability of a master or employee to one of his servants for an injury inflicted by the negligence of a fellow servant is based upon the implied contract of the parties, which is that each servant agrees to assume the risk of his fellow servant's negligence; the correlative undertaking of the master being that he will use reasonable diligence to engage none but competent fellow servants. If the master notwithstanding engages incompetent workmen, from whose negligence damage is sustained by his fellows, the master is liable for the injury because it was brought about by a breach of his implied undertaking. But this assumption by the laborer of his fellow servant's negligence, or, to put it differently, the excusing of the master for the act of such, is the result of the contract between the master and servant and is personal to them. A stranger to the contract is not entitled to its benefits, for he does not bear

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any of its obligations. As to him the fellow servant with whom he acts in doing the wrong is like any other joint tort-feasor. They are both liable for the injury they have inflicted by their negligent acts." *Pugh v. C. & O. Ry. Co.*, 101 Ky. 77, 39 S. W. 695, 72 Am. St. Rep. 392; *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339; *Johnson v. Lindsey*, 65 L. T. N. S. 97; *Smith v. N. Y., etc., R. R. Co.*, 19 N. Y. 132, 75 Am. Dec. 305; *Gray v. Phila., etc., R. R. Co. (C. C.)* 24 Fed. 168; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 702, 1 Sup. Ct. 493, 27 L. Ed. 266; *Bishop*, Noncontract Law, § 518.

We have considered the objections urged by appellant to the instructions. The instructions are numerous. For that reason, and because of the already sufficient length of the opinion, they are not set out therein. While in some respects inaptly worded, they substantially conform to the conclusions herein expressed, set forth the reciprocal duties resting upon appellant and appellee with respect to the state of facts resulting in the latter's injuries, and fairly presented for the guidance of the jury the law applicable to every issue in the case. The giving of the additional instruction after argument had been concluded was not, under the circumstances, reversible error. The instruction in question was eminently proper. The others would have been insufficient without it, and the failure to give it would have been error. The giving of instructions after the conclusion of the argument to the jury should not be approved as a practice. In a few cases this court has refused to reverse for it, where, as in this case, it was made to appear that the additional instruction was indispensably necessary, that the case had been fully and satisfactorily argued on each side, or that neither counsel asked to make a further argument on account of the additional instruction. *Turner v. Commonwealth*, 80 S. W. 197, 25 Ky. Law Rep. 2161; *Kennedy v. Commonwealth*, 100 S. W. 242, 30 Ky. Law Rep. 1066; *Sears' Adm'r v. L. & N. R. R. Co.*, 56 S. W. 725, 22 Ky. Law Rep. 152. We do not think the giving of the instruction after argument was prejudicial to appellant. It is conceded by appellant's counsel that the verdict is not unreasonable in amount.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY,
Plff. in Err. v. MAY TAYLOR, Administratrix in Succession
of the Estate of George W. Taylor, Deceased.

(Argued and Submitted April 14, 1908. Decided May 18, 1908.)

[28 Sup. Ct. Rep. 616.]

Error to State Court—Federal Question—Jurisdiction.—The contention that the courts of Arkansas have no jurisdiction of causes of action arising under the laws of the Indian territory, giving a right of action for death, does not present a Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court.

Error to State Court—Federal Question—Delegation of Power.—Whether or not legislative power is unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 5, that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the Commission, is a Federal question within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Supreme Court of the United States to state courts.

Constitutional Law—Delegation of Power—Safety Appliance Act.—Legislative power is not unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of the safety appliance act of March 2, 1893, § 5, that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the Commission.

Master and Servant—Safety Appliance Act—Drawbars of Uniform Height.—Drawbars of unloaded freight cars are required, by the safety appliance act of March 2, 1893, § 5, to be of uniform and standard height; but those of loaded cars need not be of uniform height, provided that they do not vary more than the 3 inches prescribed as the maximum permitted variation from the standard.

Error to State Court—Federal Question—Instructions Given or Refused.—A party who insists, by way of objection to or requests for instructions, upon a construction of a Federal statute which will lead to a judgment in his favor, sets up a claim of a right or immunity under such statute within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Supreme Court of the United States to state courts.

Master and Servant—Safety Appliance Act—Duty as to Drawbars.—The statutory duty imposed upon carriers in absolute terms by the safety appliance act of March 2, 1893, § 5, of using in interstate com-

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merce only such freight cars as comply with the standard fixed as the height for drawbars, is not discharged by furnishing cars constructed with drawbars of the standard height, and by furnishing to competent inspectors and train men a sufficient number of metallic wedges, or "shims," to use as occasion demands to raise to the legal standard drawbars lowered by the natural effect of proper use.

In error to the Supreme Court of the State of Arkansas to review a judgment which, on a second appeal, affirmed a judgment of the Crawford Circuit Court, in that state, in favor of plaintiff in an action to recover damages for death alleged to have been caused by defendant's negligence. Reversed.

See same case below on first appeal, 71 Ark. 445, 78 S. W. 220; on second appeal, 83 Ark. 591, 98 S. W. 958.

The facts are stated in the opinion.

Messrs. Rush Taggart, John F. Dillon, Lovick P. Miles, and Oscar L. Miles for plaintiff in error.

Mr. Sam R. Chew for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court:

The defendant in error, as administratrix of George W. Taylor, brought, in the circuit court of the state of Arkansas, this action at law against the plaintiff in error, a corporation owning and operating a railroad. Damages were sought, for the benefit of Taylor's widow and next of kin, on account of his injury and death in the course of his employment as brakeman in the service of the railroad. It was alleged in the complaint that Taylor, while attempting, in the discharge of his duty, to couple two cars, was caught between them and killed. The right to recover for the death was based solely on the failure of the defendant to equip the two cars which were to be coupled with such drawbars as were required by the act of Congress known as the safety appliance law. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174. The defendant's answer denied that the cars were improperly equipped with drawbars, and alleged that Taylor's death was the result of his own negligence. At a trial before a jury upon the issues made by the pleadings, there was a verdict for the plaintiff, which was affirmed in a majority opinion by the supreme court of the state. The judgment of that court is brought here for re-examination by writ of error. The writ sets forth many assignments of error, but of them four only were relied upon in argument here, and they alone need be stated and considered. It is not, and cannot be, disputed that the questions raised by the errors assigned were seasonably and properly made in the court below, so as to give this court jurisdiction to consider them; so no time need be spent on that. But the defendant in error insists that the questions themselves, though properly here in form, are not Federal questions; that is to say, not ques-

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tions which we, by law, are authorized to consider on a writ of error to a state court. For that reason it is contended that the writ should be dismissed. That contention we will consider with each question as it is discussed.

The accident by which the plaintiff's intestate lost his life occurred in the Indian territory, where, contrary to the doctrine of the common law, a right of action for death exists. The cause of action arose under the laws of the territory, and was enforced in the courts of Arkansas. The plaintiff in error contends that of such a cause, triable as it was in the courts of the territory created by Congress, the courts of Arkansas have no jurisdiction. This contention does not present a Federal question. Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, ante, 34, 28 Sup. Ct. Rep. 34. We have, therefore, no authority to review the decision of the state court, so far as it holds that there was jurisdiction to hear and determine this case. On that question the decision of that court is final.

The next question presented requires an examination of the act of Congress upon which the plaintiff below rested her right to recover. Section 5 of the safety appliance law is as follows:

"Within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should such association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

The action taken in compliance with this law by the American Railway Association, which was duly certified to and promul-

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gated by the Interstate Commerce Commission, was contained in the following resolution:

"Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for standard-gauge railroads in the United States, shall be $34\frac{1}{2}$ inches, and the maximum variation from such standard heights to be allowed between the drawbars of empty and loaded cars shall be 3 inches.

"Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for the narrow-gauge railroads in the United States, shall be 26 inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be 3 inches."

It is contended that there is here an unconstitutional delegation of legislative power to the railway association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349,—a case which, in principle, is completely in point. And see *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367, where the cases were reviewed.

Before proceeding with the consideration of the third assignment of error, which arises out of the charge, it will be necessary to set forth the course of the trial and the state of the evidence when the cause came to be submitted to the jury. This is done, not for the purpose of retrying questions of fact, which we may not do, but, first, to see whether the question raised was of a Federal nature; and, second, to see whether error was committed in the decision of it. Taylor was a brakeman on a freight train, which had stopped at a station for the purpose of leaving there two cars which were in the middle of the train. When this was done the train was left in two parts, the engine and several cars attached making one section and the caboose with several cars attached making the other. The caboose and its cars remained stationary, and the cars attached to the engine were "kicked" back to make the coupling. One of the cars to be coupled had an automatic coupler and the other an old-fashioned link and pin coupler. That part of the law which requires automatic couplers on all cars was not then in force. In attempting to make the coupling Taylor went between the cars and was killed. The cars were "kicked" with such force that the impact consider-

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ably injured those immediately in contact and derailed one of them. One of the cars to be coupled (that with the automatic coupler) was fully and the other lightly loaded. The testimony on both sides tended to show that there was some difference in the height of the drawbars of these two cars, as they rested on the tracks in their loaded condition, but there was no testimony as to the height of the drawbars if the cars were unloaded, except that, as originally made some years before, they were both of standard height. But as to the extent of the difference in the height of the drawbars, as the cars were being used at the time of the accident, there was a conflict in the testimony. One witness called by the plaintiff testified that the automatic coupler appeared to be about 4 inches lower than the link and pin coupler, although another, called also by the plaintiff, testified that the automatic coupler was 1 to 3 inches higher than the other. That the automatic coupler was the lower is shown by the marks left upon it by the contact, which indicated that it had been overridden by the link and pin coupler, and was testified to by a witness who made up the train at its starting point. Two witnesses called by the defendant testified to actual measurements made soon after the accident, which showed that the center of the drawbar of the automatic coupler was $32\frac{1}{2}$ inches from the top of the rail, and that of the link and pin coupler $33\frac{1}{2}$ inches from the top of the rail. The evidence, therefore, in its aspect most favorable to the plaintiff, tended to show that the fully-loaded car was equipped with an automatic coupler which, at the time, was 4 inches lower than the link and pin coupler of the lightly-loaded car. On the other hand, the evidence in its aspect most favorable to the defendant tended to show that the automatic drawbar of the loaded car was exactly 1 inch lower than the link and pin drawbar. It was the duty of the jury to pass upon this conflicting evidence, and it was the duty of the presiding judge to instruct the jury clearly as to the duty imposed upon the defendant by the act of Congress. Before passing to the consideration of the charge to the jury we will for ourselves determine the meaning of that act. We think that it requires that the center of the drawbars of freight cars used on standard-gauge railroads shall be, when the cars are empty, $34\frac{1}{2}$ inches above the level of the tops of the rails; that it permits, when a car is partly or fully loaded, a variation in the height downward, in no case to exceed 3 inches; that it does not require that the variation shall be in proportion to the load, nor that a fully-loaded car shall exhaust the full 3 inches of the maximum permissible variation and bring its drawbars down to the height of $31\frac{1}{2}$ inches above the rails. If a car, when unloaded, has its drawbars $34\frac{1}{2}$ inches above the rails, and, in any stage of loading, does not lower its drawbars more

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than 3 inches, it complies with the requirements of the law. If, when unloaded, its drawbars are of greater or less height than the standard prescribed by the law, or if, when wholly or partially loaded, its drawbars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law. On this aspect of the case the presiding judge gave certain instructions and refused certain instructions, both under the exception of the defendant. The jury were instructed, the italics being ours:

"1. The act of Congress fixes the standard height of loaded cars engaged in interstate commerce on standard-gauge railroads at $31\frac{1}{2}$ inches, and unloaded cars at $34\frac{1}{2}$ inches, measured perpendicularly from the level of the face of the rails to the centers of the drawbars, and this variation of 3 inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life should be, when unloaded, of the equal and uniform height, from the level of the face of the rails to the center of the drawbars, of $34\frac{1}{2}$ inches, and, *when loaded to the full capacity, should be of the uniform height of $31\frac{1}{2}$ inches.* Now, if the plaintiff, by a preponderance of the evidence, shows a violation of this duty on part of defendant, then this is negligence; and if the proof by a preponderance also shows that this caused or contributed to the death of Taylor, then you should find for the plaintiff, unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety, and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant. * * *

"2. *If there was the difference between the height of the center of the drawbars in the two cars in question, as indicated in the first instruction, then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for.* On that point, if such difference existed, and but for its existence the injury and death of Taylor would not have happened, then such difference is said in law to be an efficient proximate cause of Taylor's injury and death, although it may be true that other causes may have co-operated with this one in producing the injury and death of Taylor, and but for these other co-operating causes the injury and death of Taylor would not have ensued. But if such difference in height of the center of the drawbars as aforesaid actually existed, yet if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the center of the drawbars, then such difference in the height of the center of the drawbars is not in

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law an efficient proximate cause of the injury and death of Taylor."

The clear intendment of these instructions was that the law required that the drawbars of a fully-loaded car should be of the height of 31½ inches, and that if either of the cars varied from this requirement the defendant had failed in the performance of its duty. We find nothing in the remainder of the charge which qualifies this instruction, and we think it was erroneous. We should be reluctant to insist upon mere academic accuracy of instructions to a jury. But how vitally this error affected the defendant is demonstrated by the fact that its own evidence showed that the drawbar of the fully-loaded car was 32½ inches in height. Under these instructions the plaintiff was permitted to recover on proof of this fact alone. From such proof a verdict for the plaintiff would logically follow. The error of the charge was emphasized by the refusal to instruct the jury, as requested by the defendant, "that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full 3 inches between the center of the drawbars of such cars, without regard to the amount of weight in the partially-loaded car." This request, taken in connection with the instruction that the drawbars of unloaded cars should be of the height prescribed by the act, expressed the true rule, and should have been given. On the other hand, a request for instructions, which was as follows: "The court charges you that the act of Congress allows a variation in height of 3 inches between the centers of the drawbars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the drawbar shank or draft line," contained an erroneous expression of the law, and was correctly refused. It is based upon the theory that the height of the drawbars of unloaded cars may vary 3 inches, while the act, as we have said, requires that the height of the drawbars of unloaded cars shall be uniform.

But we have not the power to correct mere errors in the trials in state courts, although affirmed by the highest state courts. This court is not a general court of appeals, with the general right to review the decisions of state courts. We may only inquire whether there has been error committed in the decision of those Federal questions which are set forth in § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), and it is strenuously urged that the error in this part of the case was not in the decision of any such Federal question. That position we proceed to examine.

The judicial power of the United States extends "to all cases, in law and equity, arising under this Constitution, the laws of the

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United States, and treaties made, or which shall be made, under their authority." Const. art. 3, § 2. The case at bar, where the right of action was based solely upon an act of Congress, assuredly was a case "arising under * * * the laws of the United States." It was settled, once for all time, in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, that the appellate jurisdiction, authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of state courts so far as they pass upon a law of the United States. It was said in that case (p. 416): "They [the words of the Constitution] give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided;" and it was further said (p. 379): "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." But the appellate jurisdiction of this court must be exercised "with such exceptions and under such regulations as the Congress shall make." Const. art. 3, § 2. Congress has regulated and limited the appellate jurisdiction of this court over the state courts by § 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock v. Memphis*, 20 Wall. 590, 620, 22 L. ed. 429, 439. The words of that section material here are those authorizing this court to re-examine the judgments of the state courts "where any title, right, privilege, or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed * * * under such * * * statute." There can be no doubt that the claim made here was specifically set up, claimed, and denied in the state courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *San Jose Land & Water Co. v. San Jose Ranch Co.* 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; *Rector v. City Deposit Bank Co.* 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. ed. 596, 27 Sup. Ct. Rep. 391; *Hammond v. Whittredge*,

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204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396. The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union.

It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the safety appliance act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here.

The plaintiff in error raises another question which, for the reasons already given, we think is of a Federal nature. The evidence showed that drawbars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called "shims," which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that, in the caboose of this train, the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that, if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and ap-

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pliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measureably control their causes, instead of upon those who are, in the main, helpless in

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that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case. But, for the reasons before given, the judgment must be reversed.

Mr. Justice Brewer concurs in the judgment.

BONNETTE v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, July 13, 1908.)

[112 S. W. Rep. 220.]

Principal and Agent—Authority of Agent.*—Where a stranger was struck by a train, and required immediate medical attention, and the principal office of the railroad was many miles distant, the conductor in charge of the train had implied authority to do what might be necessary to lessen the damages in the event it should be subsequently ascertained that the railroad was liable, and could bind the company by employing a surgeon to treat the stranger, but he could not bind the company for the surgeon's contract with others.

Appeal from Circuit Court, Drew County; H. W. Wells, Judge.

Action by J. V. Bonnette against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment of dismissal after sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

The appellant sued the appellee, alleging in his complaint: "That on or about the 15th day of January, 1907, the said defendant, the St. Louis, Iron Mountain & Southern Railway Company, by its employees operating and running a locomotive engine or train of cars over its railroad track through Montrose, a station of said line of its railroad, then and there ran or backed said locomotive, engine, or train of cars against and over one Fred Ross, a stranger, and then and there, and thereby, seriously or fatally injured him by then and there crushing, under its wheels, both thigh bones, etc.; that the injury occurred in the nighttime, and that it was of a character so serious and that the emergency was so great as to require immediate surgical or medical attention; that the necessity and emergency of the occasion authorized the conductor to contract for medical services; that the said station of Montrose is many miles distant from the principal offices of the defendant and from the residences of its principal

*See foot-note appended to *Hunt v. Illinois Cent. R. Co. (Ind.)*, 13 R. R. R. 607, 36 Am. & Eng. R. Cas., N. S., 607.

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officers, and that the conductor in charge of said train, and as the agent of the defendant, employed the plaintiff, who as aforesaid was a resident surgeon at said station, to render professional services to the said Ross, and that he, in accordance with said request and employment, rendered the said Ross surgical aid and attention; that plaintiff, assisted by Dr. W. H. Shipman, acting at the request and under the employment of said conductor, took charge of said patient, Ross; that it became and was necessary to amputate both thighs; that the plaintiff, assisted by Dr. W. H. Shipman, performed said operations or amputations; that services so rendered, and money expended for unskilled labor, medicine, etc., were of the value of \$124.50; that said conductor was the highest representative of the defendant and superior officer present when the accident or injury occurred, and when said employment was made; that the defendant refused and still refuses to pay said claim notwithstanding repeated demands have been made therefor, wherefore plaintiff prays judgment," etc. The appellee demurred as follows: "Comes the defendant, the St. Louis, Iron Mountain & Southern Railway Company, by its attorney, E. A. Bolton, and demurs to the complaint herein, and for cause states that said complaint fails to state facts sufficient to constitute a cause of action against the defendant herein; that said complaint fails to state that the conductor of freight train 156 had any authority to contract for the services alleged to have been contracted for with plaintiff herein, and fails to state any facts that would bind defendant for the contract of said conductor in employing the plaintiff herein; that said complaint is otherwise informal and insufficient in law to constitute a cause of action against the defendant." The court sustained the demurrer and dismissed the complaint, and this appeal followed.

R. W. Wilson, for appellant.

T. M. Mehaffy and *J. E. Williams*, for appellee.

WOOD, J. (after stating the facts as above). This court in *Railway Company v. Longbridge*, 65 Ark. 300, 45 S. W. 907, held (quoting syllabus): "Where a railway employee is injured while in the discharge of his duties at a point distant from the company's chief offices, and there is urgent necessity for the employment of a surgeon to render professional services, the conductor; if he is the highest agent of the company on the ground, has authority to bind the company by the employment of a surgeon to render the services required by the emergency." This is the language of the court in *Railway v. Hoover*, 53 Ark. 377, 13 S. W. 1092, a case in which a doctor sued the railway company for surgical attendance upon and board of a passenger injured by the company's train. In the latter case the court held the company not liable, for the reason that "the emergency, which alone

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could have given the conductor implied authority," had terminated before the doctor was employed. This court further said: "The authority existing in such cases is exceptional. It grows out of the present emergency, and the absence and consequent inability to act of the railway's managing agent. Its existence cannot extend beyond the causes from which it sprang."

In *Railroad Co. v. State*, 29 Md. 441, 96 Am. Dec. 545, a stranger was injured in a collision, and the court said: "We are next brought to the question whether the defendant be liable for the negligence of its agents in their treatment and disposition of the deceased subsequent to the collision. This, we think, free from doubt or difficulty. From whatever cause the collision occurred, after the train was stopped, the injured man was found upon the pilot of defendant's engine, in a helpless and insensible condition, and it thereupon became the duty of its agents in charge of the train to remove him and do it with proper regard to his safety and the laws of humanity. If, in removing and locking up the unfortunate man, though apparently dead, negligence was committed, whereby death was caused, there is no principle of reason or justice upon which defendant can be exonerated from responsibility." To contend that the agents were not acting in the scope of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no farther than to have cast off by the wayside the helpless and apparently dead man, without taking care to ascertain whether he was dead or alive, or, if alive, whether his life could be saved by reasonable assistance timely rendered. In *Clyde Dyche v. Vicksburg, Shreveport & Pac. R. R. Co.*, 79 Miss. 361, 30 South. 711, Dyche was a trespasser, and was run over by the company's train. The company was not negligent in running its train over him, but after the injury the company's agents took charge of him, and undertook to administer to his needs in his wounded condition. The court said: "Assuming the charge of Dyche as it did, it was charged with the duty of common humanity, and the jury should have been allowed to pass upon whether or not it performed this duty. It is to be charged with no higher degree of duty than that of ordinary humanity, but the jury must settle that on the facts."

In *Marquette & Ontonagon R. R. Co. v. Taft*, 28 Mich. 289, 297, Judge Cooley said: "There can be no doubt that it is within the scope of somebody's employment for a railway company to cause a beast which is injured in carriage or run over at a crossing to be picked up and have the attention proper and suitable to its case, and if no one is authorized to do so much for the faithful servant of the company who is in like manner injured, but all persons in its service are impliedly forbidden to incur on its behalf any expense beyond what may be necessary to remove him

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out of the way of their trains or machinery—even to convey him to his house, or to save his life by binding up a threatening wound—then, if such is the law, the courts must not hesitate to apply it, even though it be impossible to avoid feeling that it ought not to be the law, and that no business of this extensive and hazardous nature ought to be suffered to be carried on with no one for the major part of the time empowered to recognize and perform a duty, which, at least on moral grounds, is so obvious and imperative. But we do not think such is the law.” In *Railroad Co. v. Byrd*, 89 Miss. 321, 42 South. 288, it is said: “Railroads owe to their passengers the consideration and care of ordinary humanity. It matters not how negligent a passenger may have been in producing the injury for which he sues, * * * and if, when injured, the railroad company neglects this care which common humanity would dictate, and the passenger suffers damage, he may recover against the railroad company for its dereliction.”

I have quoted liberally from the above cases to show that the authorities whether in the case of a stranger and trespasser or of an employee and passenger hold the company liable for failing to exercise ordinary care to administer to the absolute needs of the ones whose unfortunate injury it has produced, notwithstanding it may have been without fault in producing such injury, and notwithstanding the injury may have been the direct result of the party's own negligence. In so holding the company liable in such an emergency, it will be observed that the rationale of the doctrine, whether in the case of a stranger and trespasser, or of an employee or passenger, is found in the duty imposed by the dictates of common humanity. The authorities stress the moral obligation, and find from that the legal duty to alleviate as far as possible the suffering and to administer to the necessities which the company has contributed, however innocently, to produce. We confess, if the duty and the consequent liability for failure to discharge that duty grow out of the obligations which the impulses of our common humanity would suggest and impose, under such circumstances, then we do not see that the status or relationship of the party injured to the party producing the injury could affect the question of the appellee's right to recover; for, from the humane viewpoint, clearly it could make no difference whether the helpless and unfortunate victim of the accident were trespasser, employee, or passenger. We do not here either controvert or approve the doctrine of the above cases, but merely cite them to show the extent to which the authorities have gone. The doctrine of our own court in the cases cited, *supra*, although announced in cases where an employee and passenger were injured, applies here. It is a question of the authority of the conductor to act for his company. The emergency creates that authority. Some one, as Judge Cooley holds,

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must have authority to represent the company under such circumstances. The conductor is the highest agent on the ground, and is in command of the train that did the injury. Before sufficient time had intervened to ascertain whether the accident was caused by the negligence of the company, he certainly had at least the implied authority to protect his company by doing what might be necessary to lessen the damages in the event it should be afterwards ascertained that the company was liable. This authority would be sufficient to bind the company for his contract with the surgeon, but not for the surgeon's contract with others.

The judgment is therefore reversed, and the cause is remanded, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

WAALER v. GREAT NORTHERN RY. CO.

(Supreme Court of South Dakota, June 24, 1908.)

[117 N. W. Rep. 140.]

Appeal and Error—Determination—Proceedings in Lower Court—Decision as Law of Case.*—The complainant in an action for an assault on plaintiff by an employee of defendant railroad company alleged that the assault was made by such employee while acting within scope of his authority, but did not allege that the assault was neither expressly or impliedly authorized by defendant. A demurrer thereto having been sustained on appeal, plaintiff amended the complaint by adding allegations that plaintiff after being advised by defendant's section foreman and his crew, at the time of the assault, that they were instructed to construct a fence by defendant company, and proposed and intended so to do, notwithstanding plaintiff's protest for P., the owner of the land; that plaintiff said to the crew that he would remove such part of the fence then constructed if it was not removed, and would remove other fences on the land of P., and had with him an axe to tear down and remove the same, all for the purpose of preventing a trespass on P.'s land so being committed and threatened by defendant company by and through the section crew. Held, that such allegations showed that the assault on plaintiff was apparently for the purpose of continuing the work in the construction of the fence, and to prevent plaintiff

*See foot-notes appended to *Sawyer v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530, where all the authorities on the subject in this series preceding them are collected; *Soderlund v. Chicago, etc., Ry. Co.* (Minn.), 27 R. R. R. 521, 50 Am. & Eng. R. Cas., N. S., 521; *St. Louis S. W. Ry. Co. v. Bryant* (Ark.), 27 R. R. R. 504, 50 Am. & Eng. R. Cas., N. S., 504.

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from interfering therewith, and that the prior decision sustaining the demurrer was not applicable as the law of the case.

Master and Servant—Liabilities to Third Persons—Assault by Servant.*—Plaintiff was directed by the owner of certain land to go and forbid workmen on defendant's railroad from erecting a fence. Plaintiff went, and the workmen refused to desist, whereupon plaintiff procured an axe and returned to the place, and not only forbade the workmen from continuing to construct the fence, but laid his axe thereon, and threatened, if they continued, to destroy the fence, as fast as it was completed, whereupon one of the workmen committed an assault on plaintiff. Held, that the defendant was liable for the assault, under the rule making a master responsible for the acts of the servant within the general scope of the servant's employment while engaged in the master's business and in the furtherance thereof, even if the servant's acts are done wantonly and willfully, and regardless of the fact that more force was used than was necessary, and that plaintiff was unnecessarily injured.

Same—Evidence—Proof of Relation.—In an action against a railroad company for an assault committed by one of the members of a section crew, evidence held to justify a finding that the crew were employees of defendant.

Same—Scope of Authority.—Where plaintiff was assaulted by members of defendant's section crew in an endeavor to prevent them from constructing certain fences on the land of plaintiff's employer, proof that the foreman of the crew was directing the work and giving orders to the men under his charge to erect the fence was sufficient to establish his authority from defendant so to do.

Appeal from Circuit Court, Codington County.

Action by Lars O. Waler against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Winsor & McNaughton and *Hanten & Loucks*, for appellant.
Case & Shurtleff, for appellee.

CARSON, J. This is an action instituted by the plaintiff to recover damages for an alleged personal injury sustained by him by reason of an assault by one of the sectionmen, claimed to have been employed by the defendant under the direction of the foreman of the section crew. Verdict and judgment being in favor of the plaintiff, the defendant has appealed.

This action was before us at a former term of this court on an appeal from an order overruling the demurrer to the complaint, and which order was reversed by this court. The decision is reported in 18 S. D. 420, 100 N. W. 1097, 70 L. R. A. 731,

*See foot-note on preceding page.

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112 Am. St. Rep. 794. On the going down of the remittitur, the plaintiff amended his complaint and at the commencement of the trial the defendant objected to any evidence under the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and that the judgment in the former action was *res judicata* and conclusive in the present action. This contention of the appellant is in our opinion untenable. The amended complaint contains very material allegations that were not contained in the original complaint, and which have the effect of bringing the case within the rule holding a defendant liable for the act of his servant or employee. The principal amendment is made in paragraph 5 of the complaint, and is as follows: "And after being advised by the said Henry Doust and said crew at said time that they were instructed to construct said fence by said defendant company, and proposed and intended so to do, notwithstanding the protest of the said plaintiff, for said Berit Pramhus, plaintiff said to said crew then and there that he would remove such part of the fence then constructed, if it was not removed, and would remove any other fence erected upon the land of the said Berit Pramhus, and had with him at said time an ax for the purpose of tearing down and removing said fence, all for the purpose of preventing the trespass upon the said land of the said Berit Pramhus so being committed, and threatened to be committed by the said defendant company by and through the section crew." It will be observed from the foregoing allegation that the plaintiff, as the agent of Berit Pramhus, the owner of the land, not only forbade the foreman of the section crew to proceed with the building of the fence, but threatened to remove such part of the fence then constructed if it was not removed, and that he would remove any other fence constructed or placed upon the land, and had with him at said time an ax for the purpose of breaking down said fence. It thus affirmatively appears that the plaintiff was threatening to forcibly prevent the erection of said fence, and that the acts of the defendant in making the assault upon the plaintiff were apparently for the purpose of continuing the work in the construction of the fence, and to prevent the plaintiff from interfering therewith. The decision of this court, therefore in sustaining the demurrer to the former complaint does not constitute the law of the case, and the judgment therein cannot be regarded as *res adjudicata* in the present action.

The contention of the appellant that the complaint as amended does not state facts sufficient to constitute a cause of action is in our opinion untenable. The true rule as to the liability of a master for the acts of his servant seems to be that for the acts of the servant within the general scope of his employment while engaged in his master's business, and done with the view of the

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furtherance of that business and in the master's interest, the master will be responsible, even if the acts be done wantonly and willfully. *Rounds v. D., L. & W. Ry. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, was a case in which the plaintiff jumped upon the platform of a baggage car on the defendant's road to ride to a place where the cars were being backed to make up a train. The rules of the company required the baggage master to allow no person on the baggage car. The baggageman ordered the plaintiff off while the car was in motion. A pile of wood was near the track. Plaintiff replied that he could not get off because of the wood, whereupon the baggagemaster kicked him off and he fell against the wood, and then under the cars, and was injured. The court held that the fact that the plaintiff was a trespasser was not a defense, and that the evidence was sufficient to authorize the submission of the defendant's liability to a jury, and in the opinion the court, speaking by Mr. Justice Andrews, says: "It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." In the case of *Cohen v. Railway Co.*, 69 N. Y. 170, it is disclosed by the record that the plaintiff, while traveling in a buggy along the street in the city of New York, was stopped by a blockade of vehicles just as he had crossed defendant's track. The rear of the buggy was so near the track that a car could not pass without hitting it. A car came up, the driver of which after waiting a moment or two ordered the plaintiff to get off the track. Plaintiff was unable to move either way, and so notified the driver, but the driver immediately drove on, striking and upsetting plaintiff's buggy and injuring him. The Court of Appeals of New York held that the question was one of fact for the jury, and that the dismissal of the complaint by the trial court was error, and in its opinion approved the rule as laid down by Mr. Justice Andrews in *Rounds v. D., L. & W. Ry. Co.*, *supra*. In *Peddie v. Gally*, 109 App. Div. 178, 95 N.

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Y. Supp. 652, the Supreme Court of New York, Appellate Division, Second Department, held: "Where defendant authorized his collector to go to plaintiff's rooms and take away furniture purchased by plaintiff, an assault committed on plaintiff by the collector while in plaintiff's rooms to get the furniture was committed in the course of his employment, and defendant was liable therefor." The Supreme Court of New York in the late case of *Griffith v. Friendly*, 30 Misc. Rep. 393, 62 N. Y. Supp. 391, in its opinion says: "It is contended by the learned counsel for the defendants that the master cannot be held liable for the personal injuries to the plaintiff inflicted by his servants. If the master in this case authorized his servants to take the property in question from the plaintiff, and through lack of judgment or discretion they went beyond the strict line of their duty or authority, and inflicted a personal injury upon her, the master is liable. *Cohen v. Railroad Co.*, 69 N. Y. 173; *Rounds v. Railroad Co.*, 64 N. Y. 129, 21 Am. Rep. 597." In *Levi v. Brook*, 121 Mass. 501, the learned Supreme Court of Massachusetts held: "A master who orders his servants to go to the house of a person named and remove certain furniture, if the sum due the master thereon is not paid, is liable for a willful assault committed by the servants, if done in the execution of the order, and not for some private end or advantage of the servants." *Barden v. Felch*, 109 Mass. 154. In *Jackson v. Am. Tel. & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738, the learned Supreme Court of North Carolina held: "A telephone company is liable for the act of its servant charged with the duty of setting poles and stringing wires over a certain route in causing the arrest of a landowner along the route to get him out of the way in order that poles may be erected and wires strung over his property against his will." It will be observed that this case is in point for the reason that the unlawful arrest of the landowner was very analogous to the case at bar, of an assault made upon the servant of the landowner.

It is further contended by the appellant that the plaintiff's evidence does not support the verdict and judgment, but in our opinion this contention is untenable. The evidence fully sustains the allegations of the complaint, that the plaintiff was directed by Berit Pramhus to go and forbid the workmen from erecting the fence; that he did go and the workmen refused to desist, and continued the work; that he went back to the house and procured an ax and returned to the place where the workmen were engaged in erecting the fence, and not only forbade them from continuing the construction of the fence, but laid his ax upon the fence, and threatened, if they continued the work to destroy the fence as fast as it should be completed. In order, therefore, for the workmen to continue their work and construct the fence,

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it was necessary to forcibly resist the acts of the plaintiff, and in so doing it may be that more force was used than was necessary and that the plaintiff was unnecessarily injured, but this fact, as we have seen from the authorities, does not relieve the defendant from liability for the injury inflicted upon the plaintiff. We are of the opinion, also, that the evidence was sufficient to warrant the jury in finding that the workmen were employed by the defendant railroad company. The evidence clearly shows that the defendant railroad company was running the trains over the road, received the receipts for passenger and freight and the reports of the officers, paid the employees, and generally managed the affairs of the road. The fact that the road was constructed some years prior to the alleged assault by another company, and was formerly owned and operated by that company, was not material, as the defendant was in charge of the road, operating the same at the time of the alleged assault and the men constructing the fence were employed by that company and paid by it. This was sufficient to render the defendant liable in this action. Mr. F. M. Jones, called as a witness on behalf of the plaintiff, testified as follows: "I live at Watertown, S. D. I have lived there five years this coming August. I am agent for the Great Northern. I have been in that position ever since I came here. The road runs southwest of here to Huron. I have always called the road between Watertown and Huron the Great Northern. Our transportation over that line west from Watertown is sold over the Great Northern. The waybills are marked Great Northern first line of the top, and in smaller letters the bills are marked, Duluth, Watertown & Pacific. When we bill freight West, we bill it the same. I think it is the same as Huron. We make our report to the Great Northern Railway Company at St. Paul, and get them back from the same. I get my pay from the same. This section gang draws its pay from the Great Northern Railway. It drew its pay January 1, 1903, the same as it does now. I think I know Henry Doust. I knew him in January, 1903. His position with the company at that time was section foreman. I think Henry Doust was section foreman in 1903. That crew worked through Watertown to one mile east of Grover. Doust draws his pay from the Great Northern the same as other crews." It clearly appears from the evidence that Pramhus' land was west of Watertown, and within the section in which Doust was foreman.

The contention of appellant that no express authority was shown in the foreman to construct this fence by the defendant company, and that, therefore, it is not liable, is untenable. It is sufficient for the plaintiff to show that the foreman or the section boss on the road was directing the work and giving orders to the men under his charge to erect the fence. The reasonable

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and fair inference from these facts which the jury was authorized to draw was that the section boss was performing his duties under the direction of the defendant.

The court in its charge to the jury stated the rule of law applicable to this case very fairly and clearly, and under the evidence and the charge of the court we are of the opinion that the verdict of the jury was fully justified.

Finding no error in the record, the judgment of the court below and order denying a new trial are affirmed.

GALLOWAY v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Illinois, April 23, 1908. Rehearing Denied June 4, 1908.)

[84 N. E. Rep. 1067.]

Master and Servant—Actions for Injuries—Burden of Proof.*—In an action by a servant for personal injuries received from an alleged defectively constructed turntable, the burden was on plaintiff to prove that the turntable was defectively constructed, and that such construction was the proximate cause of his injury; that defendant knew, or by the exercise of ordinary care would have known, of the defect; that plaintiff did not know of the defect, and did not have equal opportunities with defendant of knowing it, or of the danger therefrom.

Same—Plaintiff's Knowledge of Danger—Elements to be Considered—Youth of Servant.—If plaintiff had knowledge of the defect, then, in determining whether he should have known of the accompanying danger, his youth, immaturity, and inexperience, so far as they appeared from the evidence, should be taken into consideration.

Same—Sufficiency of Evidence—Assumption of Risk by Minor.†—A servant employed at a turntable, while crossing the tract after giv-

*For the authorities in this series on the subject of plaintiff's burden of proof in an action against an employer for injuries to his servant, see foot-note appended to *Horton v. Seaboard Air Line Ry.* (N. Car.), 27 R. R. R. 646, 50 Am. & Eng. R. Cas., N. S., 646; third foot-note appended to *Pearsall v. New York, etc., R. Co.* (N. Y.), 27 R. R. R. 452, 50 Am. & Eng. R. Cas., N. S., 452; last foot-note appended to *Cryder v. Chicago, etc., Ry. Co.* (C. C. A.), 27 R. R. R. 448, 50 Am. & Eng. R. Cas., N. S., 448; last foot-note appended to *Kiley v. Rutland R. Co.* (Vt.), 27 R. R. R. 415, 50 Am. & Eng. R. Cas., N. S., 415; fifth foot-note appended to *Creola Lumber Co. v. Mills* (Ala.), 26 R. R. R. 395, 49 Am. & Eng. R. Cas., N. S., 395; *Austin v. Boston Elevated R. Co.* (Mass.), 26 R. R. R. 171, 49 Am. & Eng. R. Cas., N. S., 171; foot-note appended to *Moit v. Illinois Cent. R. Co.* (C. C. A.), 27 R. R. R. 176, 50 Am. & Eng. R. Cas., N. S., 176.

†See second foot-note appended to *Clippard v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107, where all the authorities in this series on the subject, preceding it, are collected; foot-notes appended to *Kansas City, etc., Ry. Co. v. Loosley* (Kan.), 24 R. R. R. 712, 47 Am. & Eng. R. Cas., N. S., 712.

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ing a signal, slipped, and his foot caught between the ties, holding him so that he was run over and injured by an engine backing onto the turntable. The ties were from 2½ to 4 inches apart, and were oily from the drippings of the locomotives. He was 20 years old, had worked there eight nights, had to cross the track many times each night, and had observed that there were open spaces between the ties the first time he worked there. Held, that he assumed the risk, and could not recover.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; A. H. Frost, Judge.

Action by Clarence W. Galloway, by his next friend, against the Chicago, Rock Island & Pacific Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an appeal by the Chicago, Rock Island & Pacific Railway Company from a judgment of the Appellate Court for the First-District affirming a judgment of the superior court of Cook county recovered by Clarence W. Galloway, appellee, against appellant, in an action on the case brought in his name by Marie L. Galloway, the mother and next friend of appellee, for personal injuries.

The declaration consists of four counts, by which it is alleged that on November 24, 1904, appellant had located at Blue Island, in Cook county, Ill., a roundhouse and turntable, used for the purpose of storing and turning engines then in use by said company along the line of its railroad; that the appellee, who was employed to operate the turntable, was a youth without experience and knowledge of the dangers incident to working around and about said turntable, and that it was the duty of appellant in employing him to fully inform him, before or at the time of his employment, of all the dangers attendant upon the work of operating said turntable, which appellant negligently failed to do; that the turntable was negligently constructed, and that appellant negligently allowed the lever operating the brake on the turntable to be and remain out of repair; that the turntable was negligently constructed, in that the ties on which the track rested were laid with just space enough between to allow the foot or leg of one passing over the turntable to be caught and held fast; that appellee, by reason of the negligence charged, while assisting in backing an engine upon the turntable, stepped between two of the ties, where his foot was caught and held fast, and his leg was then cut off by an engine passing over him before he could escape. To the declaration appellant pleaded the general issue. Upon the trial the court, at the close of all the evidence, denied the motion of appellant for a directed verdict. The jury fixed appellee's damages at \$9,000. Motions for a new

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trial and in arrest of judgment were overruled, and judgment entered upon the verdict.

The turntable in question was 75 feet in length and about 12 feet in width. It supported a single standard-gauge railroad track, the rails of which were placed on ties 8 inches square, set from $2\frac{1}{2}$ to 4 inches apart. The ties rested upon steel girders. The ends of the ties extended beyond the rails on each side of the track between 3 and 4 feet, and this space without the rails was covered with planks the entire length of the table. Between the rails, however, there was no covering over the ties, and the spaces between the ties were left open. The turntable was operated by a gasoline engine and certain levers which were upon and attached to the table, and which moved with the table. Passing upon the table from the operating end, the engine and levers were located upon the right. This machinery was covered by a small shanty built upon the table, the door opening into which was in the side of the building next to the track and about three feet from the end of the table. When an engine approached the turntable, it was the duty of the operator to first "spot" the table, or move it so that the track upon the table would be in line with the track on which the engine was standing. The table was always turned so that the end upon which the building was constructed would be next to the approaching engine. After the table was so "spotted," the operator would signal the hostler of the engine to move it onto the table, and, after that was done, the table would be turned so as to permit the engine to be moved from the table upon the track desired. If the engine approaching the table was moving with the front end toward the turntable, the signal to the hostler, who always occupied a position on the right side of the engine, could be given by the turntable operator from the door of the shanty, but, if the engine was backing up to the turntable, it was necessary for the operator to stand on the opposite side of the track to give the signal. The hostler being on the right side of the engine would be on the left side of the track as the engine backed up to the turntable, and the tender would prevent him seeing the turntable operator if the latter remained on the right-hand side of the turntable.

Appellee was employed by appellant through the witness Coffman, hereinafter mentioned, as night operator of this table. His duties began at 6 o'clock in the evening and continued until the same hour in the morning. At the time of his injury he was 20 years and 4 months of age, a boy of ordinary intelligence, and of at least ordinary experience for a person of his age. He had lived in Chicago or in the suburbs of that city practically all his life. He had worked for some time in a stamping mill. Afterwards he worked for a year and a half in a boiler shop, and later, prior to his employment by appellant, he worked for a

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year and a half in a foundry. On November 14, 1904, he began work for appellant, and during the first three nights of his employment Coffman, who had operated the table before appellee began work, stayed with him and instructed him in regard to his duties. Among other things, according to the testimony of Coffman and of appellee, Coffman at that time told him to hold down a certain lever in the shanty controlling the brake on the turntable when an engine was coming upon the table to prevent the brake which held the turntable in place being loosened by the jar of the engine, which would result in the table moving and derailing the engine. They also testified that the necessity for holding this lever arose from the fact that it was out of repair. The ties between the rails were somewhat oily from the drippings of the locomotives. There were 30 stalls in the roundhouse at this place and 25 or 30 engines would pass over the turntable every night. Between 9 and 10 o'clock in the evening of November 24, 1904, a small switch engine backed up to within 30 or 40 feet of the turntable and stopped for a signal from Galloway. The table was "spotted" by Galloway, who operated the machinery in the shanty. He then stepped over to the opposite side of the track from the shanty, and with his lantern signaled the hostler to come on, and then started across the track to the shanty. While attempting to cross one of his feet slipped down between the ties on the table, and he was unable to extricate it in time to prevent his leg being run over and cut off by the engine as it backed upon the turntable. When appellee attempted to cross the track, the only lights burning in that vicinity were the headlight of the engine, the lantern carried by appellee, and two red lights placed one on each side of the track about half way across the turntable. The arc lights which ordinarily lighted the surroundings, for some reason not disclosed, had ceased burning about 15 minutes earlier. Coffman, when directed by the superintendent of the roundhouse to employ appellee, was also directed by him to teach appellee how to operate the table. In accordance with that direction, he told appellee, in substance, that, when an engine backed up, he should, after "spotting" the table, pass across the track from the door of the shanty, signal the hostler, and immediately pass back across the track to hold the defective lever. On the morning following his first night's work appellee noticed how the ties were laid on the table, and that there were open spaces between them.

It is contended by appellant that the danger of being injured on said turntable was a risk assumed by appellee, and that the superior court erred in refusing to instruct the jury to find for the defendant.

M. L. Bell (*Benj. S. Cable*, of counsel), for appellant.

Charles M. Focll, Morse Ives, and Earl J. Walker, for appellee.

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SCOTT, J., (after stating the facts as above). To warrant the action of the superior court in denying the motion for a directed verdict as the case was presented in that court, it was necessary that there should be evidence in the record tending to prove, first, that the turntable was defectively constructed and that such defective construction was the proximate cause of appellee's injury; second, that the appellant had knowledge of, or in the exercise of ordinary care would have had knowledge of, the defect; third, that appellee did not know of the defect, and did not have equal opportunities with the appellant of knowing of it, or if he did have knowledge of the physical condition of the turntable, and therefore had knowledge of the defect which created the danger, that he did not know, and was not chargeable with knowledge of, the danger resulting from the existence of the defect. These propositions are so well established in this state that it is no longer necessary to cite authorities in support of them. If appellee had knowledge of the defect, then, in determining whether he had or should have had knowledge of the accompanying danger, it is proper to take into consideration his youth, immaturity, and inexperience in so far as they appear from the evidence.

It is to the third proposition that the argument of appellant is directed. Appellee testified that on the morning succeeding the first night that he was at work on this turntable he observed the openings between the ties. He worked there altogether 10 nights. Between the time when he first observed these openings and the night upon which he was hurt he worked there 8 successive nights—a total of 96 hours. The place was lighted by electricity, so that one could see almost as plainly as in the daytime. The door of the house or shanty covering the machinery, which was on the turntable, was on the side of the building next the track, a boarded space intervening between the door and the rail. Twenty-five or 30 engines passed over the table during each 12 hours, or at the rate of one engine about every 25 minutes. Whenever an engine approached the turntable with the tender foremost, which is said to have been frequently, it was necessary for appellee to pass from the boarded space in front of the door of the shanty directly across the track onto the planks which lay immediately alongside the rail on the other side of the track from the shanty, and, after signaling the hostler in charge of the engine, he would cross directly back to the door of the shanty. He must have made this crossing to and fro many times each night, and he therefore became entirely familiar with the construction and physical condition of the turntable, and knew, as well as any man could know, of the existence of the openings between the ties. They were before him almost constantly during his working hours. He could scarcely step out of the door of the shanty without seeing them. The defect in the brake lever with which he had to work is with-

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the track frequently every night. The danger to which he was exposed in so crossing was therefore one of which he had knowledge and which he assumed. The jury should have been instructed to return a verdict for defendant.

The judgment of the Appellate Court and the judgment of the superior court will be reversed, and the cause will be remanded to the superior court for further proceedings consistent with the views hercin expressed.

Reversed and remanded.

ATCHISON, T. & S. F. RY. CO. v. BURKS.

(Supreme Court of Kansas, July 3, 1908.)

[96 Pac. Rep. 950.]

Appeal and Error—Intermediate Order—Review.—An order for an inspection and copy of documents made under section 368 of the Code of Civil Procedure (Gen. St. 1901, § 4816) is reviewable after judgment, as an intermediate order involving the merits.

Discovery—Unverified Motion.—Such an order, granted upon an unverified motion without proof of the existence of the described documents and possession or control of them by the adverse party, is erroneous.

Same—Procedure.—Matters of procedure under the code section referred to discussed.

Evidence — Admissions — Reports of Employees.*—In an action against a railway corporation for damages for personal injuries, alleged to have been occasioned by a defective coupling apparatus, reports of its car inspectors concerning the condition of the coupler, whether based upon investigations made before or after the injury, cannot be received in evidence as admissions by the defendant of the facts stated in the reports, unless such reports have been adopted or promulgated in an authoritative way by some official having power to bind the corporation by admissions.

Master and Servant—Injury—Report as to Defects—Notice.—Reports of the character described, duly received according to some regulation or customary practice, are admissible in evidence to prove notice to the company of their contents.

(Syllabus by the Court.)

Error from District Court, Neosho County; L. Stillwell, Judge.

Action by Lydia E. Burks against the Atchison, Topeka &

*For the authorities in this series on the question whether the admissions of agents or employees are competent evidence against the principal or master, see first foot-note appended to *Robinson v. Old Colony St. Ry. Co.* (Mass.), 21 R. R. R. 860, 44 Am. & Eng. R. Cas., N. S., 860, where all those preceding it are collected.

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Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Wm. R. Smith, O. J. Wood, and A. A. Scott, for plaintiff in error.

Hugh Farrelly, T. R. Evans, and Cline & Stratton, for defendant in error.

BURCH, J. The plaintiff recovered damages suffered on account of the death of her husband, Warren A. Burks, occasioned by the negligence of the defendant. At the time he was injured the deceased was engaged in an attempt to make a coupling of freight cars. On the trial of the action it became material whether the coupling device of one of the cars was defective, and whether the defendant had notice of the defect. Previous to the time the case was called for trial, the plaintiff served upon the defendant a notice, demanding an inspection and copy, or permission to take a copy, of the report of car inspector L. H. Klein or any other car inspector or person employed by the defendant, relating to inspections of the car in question made shortly before and shortly after the date of the casualty. The defendant made no response, and the plaintiff filed an unverified motion for an order requiring compliance with the demand. The record of the proceedings at the hearing of this motion recites that the plaintiff introduced in evidence the demand for an inspection and copy of the documents referred to, and that the court, having heard the motion and demand and proof of service, and having duly inspected the same, and having heard the argument of counsel, and having been duly advised, made an order in terms as prayed for. This order was duly excepted to and was ignored.

At the trial the plaintiff offered in evidence her affidavit, stating that reports of the character described in the notice, motion, and order had been made to the defendant, and stating what they contained. She averred that the defendant's inspectors made reports both before and after the accident showing that the coupler in question was defective. The offer was made in lieu of the reports themselves. The defendant objected, challenging the existence of the documents described, asserting that no foundation had been laid for the introduction of the affidavit, and maintaining that its contents were secondary and hearsay evidence only. The court met the objection in the following manner: "My idea is this: I think, taking the proceedings that have heretofore been had, the application made to the court for permission to take a copy of this report, and the order that was made by the court, and the affidavit now filed by the plaintiff, that this is at least *prima facie* evidence that there was such a report, but the defendant says there wasn't any. Now, then,

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I will give the defendant an opportunity to show there was no such report, if the defendant wishes to do so." The defendant elected to rely upon the legal questions presented, the affidavit was read to the jury, and the court instructed the jury that it was at liberty to presume that reports had been made as stated in the affidavit, and was at liberty to consider such alleged reports in connection with all the other evidence in the cause in determining what the condition of the coupler was when Burks was killed. Exceptions by the defendant were duly saved. Error is assigned upon the order requiring the defendant to permit an inspection and copy of the alleged reports, upon the admitting in evidence of the plaintiff's affidavit relating to such reports, and upon the instruction to the jury regarding them.

The statute involved is section 368 of the Code of Civil Procedure (Gen. St. 1901, § 4816), and reads as follows: "Either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it; and if compliance with the demand within four days be refused, the court or judge on motion and notice to the adverse party, may in their discretion order the adverse party to give to the other, within a specified time, an inspection and copy or permission to take a copy of such book, paper or document; and on failure to comply with such order the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness." The order in question is clearly reviewable under section 542 of the Code (Gen. St. 1901, § 5019), permitting the reversal, vacation, or modification of intermediate orders involving the merits of an action or some part thereof. It is the manifest intention of the statute to reach the merits of the action. Its language so indicates, and its provisions are so framed. A party might altogether fail on the merits if he were denied the benefit of the order provided for, and his adversary might be able to trace defeat on the merits entirely to an affidavit admitted in evidence because of noncompliance with the order, or to the exclusion of documents which he desired to offer, but which he had declined to allow to be inspected and copied. The order, however, is of a purely intermediate character. Its consequences

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cannot be observed until they are registered in the result of the trial on the merits, and hence it is not reviewable until after judgment.

The procedure to obtain the order is by motion and notice after demand and noncompliance. No provision is made for the framing of issues on the motion. The adverse party is not called upon to show cause why the order should not be made, but the party applying must establish his right to it before the order may lawfully be granted. To entitle a party to the order there must be in existence a book, paper, or document to be inspected and copied, and this book, paper, or document must be in the possession or under the control of the adverse party. These facts are conditions precedent, and neither of them can be taken for granted. The circumstance that a demand has been made and ignored does not prove or tend to prove that they exist. The circumstance that a motion has been made asserting their existence does not afford any evidence of the truth of the assertion. The facts must be proved in some juridical way before the court is authorized to proceed, and the burden is upon the applicant to make the proof. The adverse party need not move until something has been presented which he needs to combat. In most jurisdictions either statutes or rules of court provide for a verified application or for an affidavit to accompany the motion. In others, rules derived from the old chancery practice relating to discovery exist. No rule of procedure has fallen under the observation of the court sanctioning the granting of an order without any showing other than the naked assertion of an unverified motion. It has been held that the inviolable right to be secure against unreasonable searches is involved. The right to immunity from the production of incriminating evidence and the right to protect privileged documents from disclosure may be jeopardized, and in many other respects the remedy is of such gravity and importance that it cannot be administered in any other than a judicial way. It is not necessary that the facts alluded to shall be established beyond all controversy, and in many instances slight evidence may suffice; but their existence must fairly and reasonably be made to appear by some legally recognized method, in the absence of an admission dispensing with proof.

These propositions are not contested by the plaintiff. Her position seems to be that when the court made the order it was judicially determined that the desired documents were in existence, and in the defendant's possession or control, and hence that an incontestable foundation was laid for the introduction of the affidavit. The difficulty with this argument is that it does not meet the challenge of the first assignment of error. In legal effect it was judicially determined when the order was made

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that the documents in question were in existence, and in the defendant's possession, but that determination was not made according to law. The record conclusively proves that the motion was unverified, that no affidavit was filed in support of it, that the only evidence introduced was the demand and proof of service, and that the court acted upon an inspection of the papers merely. Indeed it is not disputed that no evidence was offered upon which to base an adjudication of fact, and, the record having been made up to cover the question, it cannot be aided by presumption. It is only in respect to subjects concerning which the record is silent that presumptions may be indulged to support a judgment or order.

The court at the trial fully appreciated the necessity for proof of the facts in controversy before the affidavit could be admitted, and that no such proof existed until the affidavit came in, but its effort then to solve the situation was nugatory. The plaintiff was not making an application for a new order, and was not offering the affidavit in support of the order already made. She was demanding that the affidavit be received because an order theretofore lawfully made had been disobeyed. The defendant was not asking for a further hearing, but was contending that facts essential to the validity of the order were missing. No doubt a party may absolve himself at the trial on the merits by showing pertinent facts disabling him from complying with a valid order, but the time to try the fundamental facts upon which an order must be based is when the motion is heard. Orderly procedure requires that the progress of the trial on the merits should not be interrupted by what may be a long drawn out and fiercely contested preliminary matter. It may be of the utmost importance to one or both parties that the hearing upon the right to an inspection should not be delayed until the trial is on. But beyond this, there should be no order until the indispensable requisites prescribed by the statute are established, and an order granted without authority cannot be validated by a subsequent showing of sufficient grounds for it. It is said that the granting of the order rested in the discretion of the court, and that the exercise of such discretion is not reviewable, except in a clear case of abuse. The opportunity for the exercise of discretion does not arise until there is a field for its operation. The court has no discretion to order an inspection of a document of whose existence and locality it is ignorant. The South Carolina Code is substantially the same as that of this state. In the case of *Jenkins v. Bennett*, 40 S. C. 393, 401, 18 S. E. 929, the notice of the hearing of a motion for an order of inspection stated that the motion would be based upon the pleadings in the action and the accompanying affidavit of the plaintiff. The affidavit referred to certain plans and specifications and to a con-

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tract which, it was said, "contain evidence relating to the merits of its above-named action." On appeal an order based on this showing was reversed, the court saying: "We think it clear that, before this somewhat extraordinary power should be exercised, the moving party should show, at least *prima facie*, such fact or facts as would enable the court to exercise its discretion as to whether such a power as is invoked should be exercised. Now, in this case no facts of any kind are stated in the affidavit upon which the motion was based. The bald statement that the papers desired to be inspected 'contain evidence relating to the merits of the action' is nothing more than an expression of the plaintiff's opinion, and cannot be regarded as a statement of any fact. * * * It seems to us that the order was erroneously granted, and should therefore be reversed, not because the circuit court judge erred in the exercise of his discretion, but because the moving papers showed no facts upon which his discretion could be exercised." The existence of facts essential to its validity not having been established by affidavit of the plaintiff or otherwise, the order granting the right to inspect and take copies was erroneous. Being erroneous, it furnished no foundation for the admission of the affidavit in evidence. The affidavit having been admitted because of noncompliance with the order, and having contained matter of the utmost importance in the determination of vital questions in the case, the error was prejudicial.

Aside from the relation of the affidavit to the order, objection was made to the contents of the affidavit because they were hearsay, and the point was specifically made that if the original inspector's reports were offered, they would be hearsay. The question is whether these agents' reports are admissions of the defendant company as to the defective condition of the coupling apparatus. The rule of law is correctly formulated, so far as public corporations are concerned, by Judge Dillon: "An admission by a corporation of a fact or of a liability, duly and properly made, is, of course, evidence against it. But a municipal corporation, by accepting—that is, receiving the report of a committee of inquiry—does not admit the truth of the facts stated therein; and such a report, though accepted by a vote of the corporation, is not admissible in evidence against it." Dillon, *Munic. Corp.* (1st Ed.) § 242; *Id.* (4th Ed.) § 305. The same doctrine governs in the case of a private corporation, and is stated in *Abbott on Trial Evidence*, § 62, as follows: "An official statement or report, received by the corporation or board from one acting as officer, and accepted and adopted by them, is competent evidence against the corporation and those bound by its acts, without further proof of the appointment of the officer; but a report to a corporation or board is not made admissible

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in evidence against it by the mere fact that it was received and 'accepted,' by it, except for the purpose of charging it with notice of the contents."

It can make no difference in the application of the rule whether the investigation and report are made before an accident has occurred, with a view of making repairs if necessary, improving the equipment or service, or preventing accident, or whether they occur after an accident with a view of ascertaining the circumstances or cause. The commission of the inspector is the simple obtaining of information upon which the company may act, and when he makes a report of what he has observed, the corporation does not speak through him, as in cases where a principal sends his agent out to transact his business with the public, so that whatever the agent may say or do in the prosecution of the enterprise while he has it in charge is the speech and act of the principal. The report is only a recital of the inspector's observation, and does not commit the company to its truth until it is taken up and adopted as the position of the company by some one having authority to bind it in such matters. In litigation between the company and a third person the inspector is a competent witness as to what he saw, but the existence of the state or condition in controversy cannot be proved against the company by his mere declaration concerning it. Suppose that several officials having authority, but acting independently, should cause a bridge or building or piece of track or machinery to be inspected by different subordinates, and that the reports should disagree. Suppose an accident should occur in the operation of a train, that the rules should require every employee connected with the train to investigate and report the physical facts, and that the reports should disagree. What is the truth, and which of these reports, made by agents designated for the purpose, and who, therefore, act "in the line of duty," are admissions by the company of the state of facts narrated? Considerations like these led Chief Justice Bleckley, distinguished alike for his keen penetration and sound judgment, to say: "It surely cannot be sound law to hold that by collecting information, whether under general rules, or special orders, and whether from its own officers, agents, and employees or others, a corporation acquires and takes such information at the peril of having it treated at its own admission, should litigation subsequently arise touching the subject-matter. As well might it be considered that any and every suitor who sends out agents to discover witnesses and collect facts touching his rights or duties regarding a pending or prospective lawsuit is to be met at the trial with the communications made by or to such agents as admissions made by himself." *Carroll v. East Tenn., etc., Railway Co.*, 82 Ga. 452, 475, 10 S. E. 163, 165 (6 L. R. A. 214).

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While investigating the condition of its own property and affairs, taking the reports and opinions of its employees upon the subject, and considering what course it ought to pursue, the corporation holds no relation to the general public which enables third persons to seize upon some intermediate step or statement in the proceeding apparently to his advantage, and say that a final admission has been made at that point. But let it be conceded that the inspection of coupling appliances on the cars of its trains is a branch of a railway company's business which brings its inspectors in contact with the public, and what is the result? It is elementary law that to bind his principal the declarations of an agent must be contemporaneous with the event in question, must be made in the transaction of the business committed to his charge, and as a part of it, and must be calculated to unfold its nature, and to illustrate and explain its character, so that acts and declarations combine and harmonize to form one transaction. During an inspection only those declarations could bind the company which would illustrate, explain, and characterize the work of making the inspection. After an inspection has been completed a narration of the things impressed upon the inspector's senses would fill none of the requirements of an admission; and the function of binding the company by admissions not having been delegated to the inspector, the making of the report itself, considered as a part of his business, could not include such a consequence.

The following cases contain discussions of the principles involved which support these views: *Carroll v. East Tenn., etc., Railway Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; *Powell v. Northern Pacific Railroad Co.*, 46 Minn. 249, 48 N. W. 907; *North Hudson County Railway Co. v. May*, 48 N. J. Law, 401, 5 Atl. 276; *Insurance Co. v. Mahone*, 21 Wall. (U. S.) 152, 22 L. Ed. 593; *Wabash R. R. Co. v. Farrell*, 79 Ill. App. 508; *C., C. & St. L. Ry. Co. v. Ullom, Adm'x*, 20 Ohio Cir. Ct. R. 512; *Doyle v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 42 Minn. 79, 43 N. W. 787; *Verry v. B., C. R. & M. R. Co.*, 47 Iowa, 549, 551; *Reem v. St. Paul City Ry. Co.*, 77 Minn. 503, 80 N. W. 638, 778; *Wellington v. Boston & Maine Railroad*, 158 Mass. 185, 33 N. E. 393; *Bessemer C. L. & L. Co. v. Doak* (Ala.) 44 South. 627, 12 L. R. A. (N. S.) 389. The case of *Vicksburg, etc., Railroad Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257, might seem, on first impression, to be an opposing authority, but it probably does no more than carry out the doctrine, expressed in the quotation from Abbott's *Trial Evidence*, that when a report has been adopted and promulgated, as that of the corporation, it is admissible in evidence against it. In that case the superintendent of a railroad, who doubtless was regarded as an agent, with power to know and declare the

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condition of the road, had made printed reports to the board of directors, which were admitted in evidence in a personal injury case. The court devoted a single sentence to the subject which reads thus: "The reports made by the superintendent to the board of directors in the course of his official duty were competent evidence, as against the corporation, of the condition of the road." The decision in the case of *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725, is sustainable upon the same theory, although such may not have been the court's view. In that case it appeared that it was the practice of the defendant's superintendent to make an immediate report in case of an accident to an employee, and to send it to the main office, which then forwarded the report to an insurance company that had undertaken to indemnify the defendant against loss. That course having been pursued, the document was admitted in evidence as an admission of the defendant that the party injured was an employee. The following cases reach conclusions different from those expressed above: *Texas & Pacific Ry. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955; *Lipscomb v. Railroad Co.*, 65 S. C. 148, 43 S. E. 388; *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *Krogg v. Atlantic, etc., Railroad*, 77 Ga. 202, 4 Am. St. Rep. 77.

In some jurisdictions the position is taken that reports of the kind in question are confidential communications, and that such communications are not admissions; the rule of privilege being applied. *Smith v. Evans*, 74 Ohio St. 17, 77 N. E. 280; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202; *In re Devela*, L. R. 22 Ch. Div. 593. Under the statute of this state, defining what are privileged communications, such reports in the hands of the company would not be privileged. What their status might be if in the hands of the company's attorneys need not be discussed.

The court is of the opinion the inspector's reports, offered in evidence through the medium of the plaintiff's affidavit, were inadmissible to prove the condition of the coupling appliance to which they referred. The plaintiff has made no contest, and has cited no authorities upon the subject just discussed, but has chosen to rely entirely upon the proposition that the reports in controversy established notice to the defendant of the defective condition of the coupling device. The proposition is too broad. Such reports, when duly received according to some regulation or customary practice, are notice to the company of their contents. Whether they afford notice of the defective condition of a coupler depends upon whether defects in the coupler are proved, and the proof must be by evidence other than the reports themselves. However, the judgment cannot be saved on the point urged, because the court specifically instructed the jury,

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as before noted, that the reports might be considered in determining the condition of the coupler when Burks was killed.

Since the case must be reversed some further observations upon the procedure involved are necessary. The plaintiff argues that she needed to see the inspector's reports, in order to determine who should be subpoenaed as witnesses to show the defective condition of the coupler. An order of inspection cannot be granted for any such purpose. The only right to be conserved is that of a party to have the evidence which is contained in a document in the hands of his adversary.

The motion for the order should contain all the facts entitling the applicant to the relief desired. It is not enough that according to a prior reasoning the desired documents should be in the opponent's possession. It is not enough to say that the documents referred to contain evidence relating to the merits. The facts should be stated with reference to every essential matter. The determination of the question of materiality at the hearing on the motion need not be absolute, and is not conclusive, but the court should be enabled to see for itself that a fair case of materiality is presented. In this case the affidavit of the plaintiff contained a large number of statements, in no way descriptive of the documents in controversy, some of which were highly prejudicial to the defendant. Nothing should be read to the jury except the allegations showing the character of the documents which have not been produced in obedience to the order; that is, the statements which take the place of the documents themselves. If an order of inspection has been wrongfully disobeyed, and an affidavit has been received in lieu of the documents, the adverse party is then concluded. He has no right to cross-examine the affiant upon the statements contained in the affidavit.

The judgment of the district court is reversed, and the cause is remanded for a new trial.

CHICAGO, R. I. & P. RY. CO. *v.* SIMPSON.

(Supreme Court of Arkansas, Sept. 21, 1908.)

[112 S. W. Rep. 875.]

Carriers—Carriage of Passengers—Vestibuled Coaches—Duty of Carriers.*—While a railroad company is not bound to provide vestibuled coaches on its passenger trains, yet where it does so passengers may presume that they are safe for the purpose intended, and for negligence in these particulars, resulting in injuries to passengers, the company is liable.

Same.*—Where plaintiff, a passenger on a vestibuled rear coach of defendant railroad's train, was not led by defendant to believe that the rear platform could be used to ride on for observation or other purposes, but stood thereon, and fell through an open vestibule door, and was injured, defendant was not liable.

Appeal from Circuit Court, Yell County; Hugh Basham, Judge.

Action by A. J. Simpson against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

Charlie Simpson, a boy 16 years and 11 months of age, was riding on the platform of the back coach of appellant's passenger train from Hot Springs, Ark., to Little Rock. He fell from the platform and was severely injured. The coach was provided with a vestibule, but the door and vestibule platform or floor, on the side next to the station platform at Hot Springs, were left open, so that passengers might enter. This door and vestibule floor on one side continued open until the accident occurred. The door

*For the authorities in this series on the question whether a railroad company is under obligation to provide vestibuled coaches, see extensive note, 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154; *Sansom v. Southern Ry. Co.* (C. C. A.), 1 R. R. R. 88, 24 Am. & Eng. R. Cas., N. S., 88 (liability for death of passenger caused by jerking of train as affected by failure to have solid vestibuled train, as advertised).

For the authorities in this series on the subject of the right of a passenger to rely on the assumption that the carrier has performed, or will perform, its duties to him, see foot-notes appended to *McGovern v. Interurban Ry. Co.* (Iowa), 26 R. R. R. 242, 49 Am. & Eng. R. Cas., N. S., 242; second foot-note appended to *Karr v. Milwaukee, etc., Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623; *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487; third foot-note appended to *Mobile T. & R. Co. v. Walsh* (Ala.), 24 R. R. R. 114, 47 Am. & Eng. R. Cas., N. S., 114; *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; last foot-note appended to *Chesapeake & O. Ry. v. Harris* (Va.), 18 R. R. R. 139, 41 Am. & Eng. R. Cas., N. S., 139.

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and floor on the other side were closed. When the train had gone about 16 miles, Simpson, while standing on the platform, according to his testimony, fell down through the opening to the ground. Simpson was a passenger. He and some other passengers were using the platform, instead of going into the coach. There was plenty of room in the coach for passengers. Appellee, the father of young Simpson, sued the appellant for damages because of the injury, alleging that appellant negligently left open and unclosed the gate and door leading to and from said vestibule to the platform at depots through which passengers enter and depart at stations, and knowingly permitted the same to remain open until after the said Charlie Simpson was injured. Appellant denied negligence. The evidence on behalf of appellee, so far as it is necessary to state it, showed substantially the above facts on the question of appellant's negligence.

Among other requests for instructions, the appellant asked the following: "(1) You are instructed that under the pleadings and the evidence in this case the plaintiff is not entitled to recover, and your verdict will be for the defendant." "(10) You are instructed that it was not negligence in the defendant to leave the vestibule door open at the rear end of the rear coach of its train." These the court refused, but gave, among others, the following: "(8) Where a railroad company provides its cars with vestibule doors, it is not only answerable for the negligent acts of its servants in opening and permitting them to remain open, but it is also responsible for its failure to exercise a high degree of care, to the end that such doors shall be closed and the vestibule rendered reasonably safe." The verdict and judgment were for \$700.

Busbee & Hicks and *Geo. B. Pugh*, for appellant.

Bullock & Davis and *J. T. Bullock*, for appellee.

WOOD, J. (after stating the facts as above). As is said in *Wagoner v. Wabash R. Co.*, 118 Mo. App. 239, 94 S. W. 293, "the purpose of the vestibuled cars is to add to the comfort, convenience, and safety of passengers, more particularly while passing from one car to another." While railway companies are not bound to provide vestibuled coaches on their passenger trains, yet where they have done so passengers will have the right to assume that they are convenient and safe for the purpose intended and that they will be prudently managed. Any negligence upon the part of railway companies in these particulars, resulting in injury to their passengers, will render them liable in damages. 2 Hutch. Carr. 927. The uncontroverted proof in this case shows that appellant was guiltless of any negligence in the management of its vestibule appliances that resulted in injury to young Simpson. The vestibule in question, being at the rear end of the rear

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coach, could not be used for crossing from one car to another. There was, therefore, no duty upon the part of the appellant to have the rear end of the last coach in the train vestibuled, in order that passengers might pass from car to car in safety. Appellant had not led young Simpson to believe that a vestibuled platform could be used to ride on for observation, conversation, or other purposes. See *Crandall v. Minneapolis, St. Paul, etc., Ry. Co.*, 96 Minn. 434, 105 N. W. 185, 2 L. R. A. (N. S.) 645, 113 Am. St. Rep. 653. Appellant was under no duty to provide a vestibule for such purposes, and was therefore not liable for its failure to do so.

Having found that there was no actionable negligence on the part of appellant, under the undisputed evidence, it follows that the court erred in its refusal to grant the prayers of appellant, *supra*; also in giving the instruction No. 8 set forth in the statement. This conclusion renders it unnecessary to pass upon the question of contributory negligence.

The judgment is therefore reversed, and the cause is remanded for new trial.

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- Care required of passenger for his own safety, after being ejected from train, as affected by his intoxication. *Mobile, etc., R. Co. v. Jackson (Miss.)*, 120.
- Care required of passenger in using, and her right to use, a dark path very close to railroad track, after leaving depot. *Powell v. Philadelphia & R. Ry. (Pa.)*, 536.
- Court should have instructed that plaintiff could not recover, on account of negligent delay in transporting him and failure to properly heat his car for any suffering or sickness which he might have prevented by ordinary care. *Southern Ry. Co. v. Miller (Ky.)*, 311.
- Degree of care required of passenger. *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 76.
- Duty of passenger to take the place on street car assigned to him by conductor. *Mittleman v. Philadelphia Rapid Transit Co. (Pa.)*, 659.
- Excuse for alighting passenger attempting to cross other track without looking for car by which he was struck. *Yevsack v. Lackawanna & W. V. R. Co. (Pa.)*, 332.
- Extending hand, arm, or head outside of car window or door. *La Barge v. Union Elec. Co. (Iowa)*, 298.
- Of passenger injured by reason of violent jerk of train, while standing, preparatory to alighting, holding to knob of car door, was question for jury. *St. Louis, etc., Co. v. Brabbzson (Ark.)*, 625.
- Passenger killed in a collision with another train standing at station, while he was on car platform. *Chicago G. W. Ry. Co. v. Mohaupt (C. C. A.)*, 364.
- Passenger, struck by train while on station premises, was guilty of contributory negligence precluding recovery, though the carrier did not perform the full measure of its duty in the matter of supplying lights for such premises. *Pere Marquette R. Co. v. Strange (Ind.)*, 66.
- Passenger taking position on step of interurban car after signifying his desire to alight. *Heinze v. Interurban Ry. Co. (Iowa)*, 330.
- Passenger's negligence, while riding on caboose car, contributed as a proximate cause of his death, so as to bar recovery. *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 76.
- Person accompanying State Guards, to fill out quota of company, remaining in insufficiently heated car without necessity. *Louisville & N. R. Co. v. Scalf (Ky.)*, 343.
- Prevalence of storm and freezing weather imposes upon a passenger an extra degree of care to avoid injury in alighting from car. *Riley v. Rhode Island Co. (R. I.)*, 129.
- Riding in place of obvious danger when chargeable with notice that it is not provided for passengers. *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 76.
- Riding on platform of street car by direction of conductor. *Mittleman v. Philadelphia Rapid Transit Co. (Pa.)*, 659.
- Riding on top of caboose, instead of in a passenger coach. *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 76.

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Rules of carrier, duty of passengers to comply with. *Funderburg v. Augusta & A. Ry. Co. (S. Car.)*, 281.

Vestibuled cars, right of carrier to presume as to safety of. *Chicago, etc., Co. v. Simpson (Ark.)*, 798.

Woman carrying market basket thrown against seat while entering door of street car. *Howard v. Louisville Ry. Co. (Ky.)*, 116.

Damages.

Exemplary damages could not be recovered against carrier for ejection of sick boys, one of whom died three days later, from train by quarantine officer. *St. Louis, etc., R. Co. v. Roane (Miss.)*, 337.

In action for negligent delay in transporting passenger, and for failure to keep car properly heated, the court should have instructed that if, as a proximate cause of the alleged negligence, plaintiff was made sick, the jury should find a fair compensation for the time lost, and any physical or mental suffering endured and for any permanent reduction of his power to earn money, if such there was. *Southern Ry. Co. v. Miller (Ky.)*, 311.

Mental suffering of plaintiff, due to negligent treatment by carrier of her invalid sister, while both were passengers. *Gulf, etc., Ry. Co. v. Overton (Tex.)*, 302.

Passenger may recover for inconvenience or injury due to a failure of the carrier to exercise that degree of care towards her that is due a passenger. *Gulf, etc., Ry. Co. v. Overton (Tex.)*, 302.

Punitive damages for ejection from train at last stop before reaching passenger's destination, sufficiency of evidence to warrant recovery of. *Illinois Cent. R. Co. v. Reid (Miss.)*, 663.

\$7,500 was excessive verdict against carrier for the ejection of two sick boys from train (one of whom died 3 days later) by quarantine officer. *St. Louis, etc., R. Co. v. Roane (Miss.)*, 337.

\$1,500 was not excessive verdict for consequences of failure by carrier to inform passenger as to the best and quickest route. *Southern Ry. Co. v. Nowlin (Ala.)*, 261.

\$425 was not excessive damages for failure to give child, at night, a street car transfer; recovery for fright and sickness being authorized. *South Covington & C. St. Ry. Co. v. Quinn (Ky.)*, 508.

Degree of Care.

Care due passenger on running board of street car. *Hinckley v. City of Danbury (Conn.)*, 652.

Care required in keeping cars heated. *Southern Ry. Co. v. Miller (Ky.)*, 311.

Certain instruction as to degree of care due from railroad to passengers in Pullman sleeping car was not erroneous. *Louisville & N. R. Co. v. Church (Ala.)*, 168.

Common carrier must use ordinary care to carry its passengers to their destination in a reasonable time. *Southern Ry. Co. v. Miller (Ky.)*, 311.

Common law rule making a distinction between passengers being transported and those not being transported, with respect to the degree of care required of the carrier, has not been rescinded or modified in Indiana. *Pere Marquette R. Co. v. Strange (Ind.)*, 66.

Degree of care due passengers on freight trains. *St. Louis, etc., Co. v. Brabbzson (Ark.)*, 625.

Freight trains. *Tinkle v. St. Louis, etc., R. Co. (Mo.)*, 470.

CARRIERS OF PASSENGERS—Continued.

Hidden internal defect, whether carrier liable for injury to passenger resulting from. *Roanoke & Elec. Co. v. Sterrett* (Va.), 611.

Highest degree of care required of carrier. *McLean v. Atlantic Coast Line R. Co.* (S. Car.), 76.

Passenger struck by missile while sitting at car window, liability of carrier for injury sustained by. *Ginn v. Pennsylvania R. Co.* (Pa.), 650.

Required of street railway in the operation of its cars. *Briggs v. Durham Traction Co.* (N. Car.), 324.

Slightest defect against which human prudence might have guarded, and by reason of which an injury might have occurred, renders carrier liable for injury to passenger. *Roanoke Ry. & Elec. Co. v. Sterrett* (Va.), 611.

Where failure of the air brake of an electric car to work, without premonition or warning, was the sole cause of a collision, the carrier was not negligent. *Tucker v. Rhode Island Co.* (R. I.), 315.

Where street cars are so loaded as to fill the standing room inside and the footboard, care by carrier must be proportionate to the dangers to which its passengers are exposed. *La Barge v. Union Elec. Co.* (Iowa), 298.

Delay.

Carrier is not responsible for delays caused by accidents that ordinary care may not guard against. *Southern Ry. Co. v. Miller* (Ky.), 311.

That passenger was infirm or in a condition which aggravated injuries resulting from carrier's delay in transporting, and from failure to keep its cars in a reasonably comfortable condition, did not excuse defendant from liability. *Southern Ry. Co. v. Miller* (Ky.), 311.

The court should have instructed that if when the delay was not negligent, plaintiff voluntarily left the train, before it arrived, and walked to the station, he could not recover for any sickness brought on him by the walk. *Southern Ry. Co. v. Miller* (Ky.), 311.

Discharging Passengers.

Duty of conductor when he knows that an alighting passenger is too drunk to take care of himself. *Mobile, etc., R. Co. v. Jackson* (Miss.), 120.

Negligence in permitting train to pass on intervening track when passenger was alighting from train at station, sufficiency of evidence of to sustain verdict for plaintiff. *Besecker v. Delaware, etc., R. Co.* (Pa.), 358.

Negligence in suddenly increasing speed while passenger is alighting from moving street car. *Sandlin v. Lexington Ry. Co.* (Ky.), 498.

Negligence per se to permit train to pass on intervening track when passengers are alighting from train at station. *Besecker v. Delaware, etc., R. Co.* (Pa.), 358.

Sufficiency of evidence to render carrier liable where, as passenger was alighting from car, the conductor released the trolley rope and swung it around in front of car steps, and it struck the passenger in the eye, destroying its sight. *Coolidge v. La Crosse City Ry. Co.* (Wis.), 334.

Duty of carrier not to expose passenger to unnecessary peril. *Carleton v. Central of Georgia Ry. Co.* (Ala.), 269.

Duty to furnish sufficient accommodation for safe transportation of passengers. *Anderson v. South Carolina & G. R. Co.* (S. Car.), 503.

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Duty to provide safe place for passenger to ride. *Carleton v. Central of Georgia Ry. Co. (Ala.)*, 269.

Effect of impossibility of determining whether cold contracted by passenger was due to insufficient heating of car. *Louisville & N. R. Co. v. Scalf (Ky.)*, 343.

Ejection.

Conductor should not have allowed the boys in question to be put off the train by quarantine officer. *St. Louis, etc., R. Co. v. Roane (Miss.)*, 337.

Drunken passenger drowned after alleged wantonness in ejecting him from train, insufficiency of evidence to sustain verdict for plaintiff. *Mobile, etc., R. Co. v. Jackson (Miss.)*, 120.

For error in mileage book purporting to have been issued to a man, where conductor knew that plaintiff, a woman, was its real owner. *Parish v. Ulster & D. R. Co. (N. Y.)*, 349.

Force in ejecting passenger who had become a trespasser, right to use. *Mills v. Seattle, etc., Ry. Co. (Wash.)*, 621.

On refusal of payment of fare by passenger, and on the stopping of the train to eject him on that ground, any contract, or any right to contract, for passage on such train, was forfeited; and the conductor was under no obligation to accept the offer of another passenger to pay his fare. *Mullins v. Illinois Cent. R. Co. (Miss.)*, 328.

Passenger on wrong car became a trespasser subject to ejection, notwithstanding conductor's refusal to give him a transfer to another car on which he might complete his journey for the same fare. *Mills v. Seattle, etc., Ry. Co. (Wash.)*, 621.

Plaintiff was not entitled to recover for his ejection from train for nonpayment of fare. *Mullins v. Illinois Cent. R. Co. (Miss.)*, 328.

Right to use force to prevent person from boarding street car after it had started. *Sullivan v. Boston Elev. Ry. Co. (Mass.)*, 322.

Sufficiency of allegation in complaint of negligent conduct of carrier's servants. *Birmingham, etc., Co. v. Yielding (Ala.)*, 285.

Sufficiency of plea attempting to justify ejection by alleging that plaintiff changed cars during journey and refused to pay a second fare, where it failed to show a rule requiring collection of a second fare in such cases. *Birmingham, etc., Co. v. Yielding (Ala.)*, 285.

Use of unnecessary force, liability of carrier on account of. *Birmingham, etc., Co. v. Yielding (Ala.)*, 285.

Electric railroad is not required to run all its cars the entire length of its line in the same direction, nor provide for the transfer of passengers from one car to another in the same direction. *Mills v. Seattle, etc., Ry. Co. (Wash.)*, 621.

Evidence.

Evidence of complaints as to condition of the car in question made by other passengers to each other, but not to the carrier's employees, was incompetent. *Louisville & N. R. Co. v. Scalf (Ky.)*, 343.

Evidence of negligence to lay street car tracks so close together that space between open cars operated thereon is very narrow. *La Barge v. Union Elec. Co. (Iowa)*, 298.

Insults.

Duty of carrier to see that passenger is treated with respect by its servants. *Carleton v. Central of Georgia Ry. Co. (Ala.)*, 269.

CARRIERS OF PASSENGERS—Continued.

It is incumbent on a railroad to carry passengers to their destination, and it is immaterial who owns the track on which it runs its cars into the station. *Southern Ry. Co. v. Miller (Ky.)*, 311.

Jars and Jolts.

Duty of conductor to see that passenger was not in the act of alighting before starting car, which had come to a full stop, with unusual violence. *Heinze v. Interurban Ry. Co. (Iowa)*, 330.

Duty of crew of street car to know that passenger is in the act of getting on it. *Birmingham Ry., etc., Co. v. Lee (Ala.)*, 132.

Duty not to start street car while passenger is boarding, though he merely has hold of its hand holds. *Birmingham Ry., etc., Co. v. Lee (Ala.)*, 132.

Duty to keep street car stationary until passenger has seated himself. *Howard v. Louisville Ry. Co. (Ky.)*, 116.

Duty to keep street car standing until passenger has boarded car and seated herself. *Sauvan v. Citizens' Elec. St. Ry. (Mass.)*, 108.

Evidence of carrier's negligence was sufficient to go to jury. *St. Louis, etc., Co. v. Brabbzson (Ark.)*, 625.

If ordinary and usual movements of street car in starting cause a passenger to fall while attempting to get a seat, the carrier is not liable. *Howard v. Louisville Ry. Co. (Ky.)*, 116.

Motorman of electric street car is not bound to maintain uniform speed, even though the car is between 250 and 300 feet from a stopping place for which signal has been given. *McGann v. Boston Elev. Ry. Co. (Mass.)*, 618.

Street car passenger injured while in the act of taking a seat, in consequence of the starting of the car, cannot recover unless the car was recklessly started. *Howard v. Louisville Ry. Co. (Ky.)*, 116.

Sufficiency of evidence to sustain verdict for defendant, in action against street railway for injuries to passenger in act of taking seat, alleged to be due to the sudden starting of the car. *Howard v. Louisville Ry. Co. (Ky.)*, 116.

Liability of carrier for misdirection of prospective passenger as to best and quickest route. *Southern Ry. Co. v. Nowlin (Ala.)*, 261.

Limiting Liability.

Express companies' employees, validity of contracts between railroad companies and express companies with respect to. *Sewell v. Atchison, etc., Ry. Co. (Kan.)*, 86.

Passenger purchasing ticket to his destination has no option to take a circuitous route, and he is confined to the through route. *Kelly v. New York City Ry. Co. (N. Y.)*, 368.

Passenger struck by missile while sitting at car window was properly nonsuited because of insufficiency of evidence to connect the accident with any defect or negligence attributable to the carrier. *Ginn v. Pennsylvania R. Co. (Pa.)*, 650.

Pleading.

Not essential that negligence imputed to carrier's servants should be alleged to have been the result of acts within scope of their duties. *Birmingham Ry., etc., Co. v. Harden (Ala.)*, 653.

Sufficiency of complaint in action for injuries to passenger, which alleges that passenger's hand was caught in car on train between a table and the wall of the car, and was injured, etc. *Louisville & N. R. Co. v. Church (Ala.)*, 168.

Presumption of Negligence.

Common law doctrine making a distinction between passengers

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being transported and those not being transported, with respect to the application of the rule raising a presumption of negligence from the fact of a passenger being injured, has not been rescinded or modified in Indiana. *Pere Marquette R. Co. v. Strange* (Ind.), 66.

Effect of proof that street car passenger was injured in a collision between two cars moving in opposite directions. *Briggs v. Durham Traction Co.* (N. Car.), 324.

Passenger does not make out prima facie case merely by proof that his street car gave a jerk or similar motion, and that he was hurt. *McGann v. Boston Elev. Ry. Co.* (Mass.), 618.

Passenger riding on caboose injured by reason of its derailment. *McLean v. Atlantic Coast Line R. Co.* (S. Car.), 76.

Presumption of carrier's negligence does not arise from the mere abstract fact of an accident to passenger, but its existence depends upon the nature of the accident. *Roanoke Ry. & Elec. Co. v. Sterrett* (Va.), 611.

Rebuttal of presumption of negligence arising from fact that passenger is injured. *Roanoke Ry. & Elec. Co. v. Sterrett* (Va.), 611.

Res ipsa loquitur, application of rule of. *Paul v. Salt Lake City R. Co.* (Utah), 144.

Res ipsa loquitur rule applies to the operation of street cars and to all passengers alike whether injured while riding in a car or in getting on and off. *Paul v. Salt Lake City R. Co.* (Utah), 144.

Protection of Passengers.

Carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of a fellow passenger that it is to carry him safely. *Farrier v. Colorado Springs, etc., Ry. Co.* (Colo.), 110.

Duty of conductor to prevent quarantine officer from ejecting two sick boys from train. *St. Louis, etc., R. Co. v. Roane* (Miss.), 337.

Question for jury whether street car conductor's failure to cause a passenger to place the hoe he was carrying on the car floor was negligence with respect to another passenger struck by it. *Farrier v. Colorado Springs, etc., Ry. Co.* (Colo.), 110.

Test of carrier's negligence where street car passenger so carried a hoe that its handle caught under the hood of the forward car and broke, hurling a piece back into the rear car and striking another passenger. *Farrier v. Colorado Springs, etc., Ry. Co.* (Colo.), 110.

Proximate Cause.

Passenger could not recover for the negligent and unlawful placing of a baggage car, in rear of a passenger car, in violation of Burns' Ann. St. 1901, § 5191, since that was not the proximate cause of his injury. *Pittsburgh, etc., Ry. Co. v. Schepman* (Ind.), 306.

"Reasonable" accommodations for convenience and safety of passengers, what constitutes, within meaning of S. Car. Code 1902, § 2157. *Anderson v. South Carolina & G. R. Co.* (S. Car.), 503.

Right of electric railroad to require passengers to take such cars only as will transport them to their destination without change of cars. *Mills v. Seattle, etc., Ry. Co.* (Wash.), 621.

Rules and Regulations.

Discretion of conductor as to making change, under certain rule. *Funderburg v. Augusta & A. Ry. Co.* (S. Car.), 281.

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Necessity of giving passengers notice of. *Funderburg v. Augusta & A. Ry. Co. (S. Car.)*, 281.

Passenger is not authorized to take another car and refuse to pay a second fare when demanded, after being informed of the rule requiring such payment, although insufficient accommodations are provided on the first car. *Birmingham, etc., Co. v. Yielding (Ala.)*, 285.

Right of carrier to adopt rules for the transaction of its business. *Funderburg v. Augusta & A. Ry. Co. (S. Car.)*, 281.

Rule authorizing conductors to refuse to give more than \$1.95 in change for a single fare, reasonableness of. *Funderburg v. Augusta & A. Ry. Co. (S. Car.)*, 281.

Separation of Colored Passengers.

Care required of conductor in requiring white passengers to leave car provided for colored passengers. *Carleton v. Central of Georgia Ry. Co. (Ala.)*, 269.

Question for jury whether intestate was killed, by fall from moving train, by reason of breach of duty by conductor, when pushing him from car provided for colored passengers. *Carleton v. Central of Georgia Ry. Co. (Ala.)*, 269.

Sleeping Cars.

Degree of care required of railroad company, certain instruction as to, in action for injuries to passenger while in a Pullman car, caused by a table handled by a porter falling on her hand, was not erroneous. *Louisville & N. R. Co. v. Church (Ala.)*, 168.

Duties and liabilities of railroad with respect to its passenger while he is on sleeping car by virtue of contract with sleeping car company. *Calhoun v. Pullman Co. (C. C. A.)*, 173.

Duties of railroad to passenger while he is entitled to special accommodations in sleeping car, under contract with another company. *Calhoun v. Pullman Co. (C. C. A.)*, 173.

Injury to passenger in sleeping car company's car, liability of railroad for. *Louisville & N. R. Co. v. Church (Ala.)*, 168.

Presumption that Pullman car porter exercised control in sleeping car with assent of railroad company. *Louisville & N. R. Co. v. Church (Ala.)*, 168.

Railroad was liable for any neglect of duty by Pullman car porter resulting in table falling upon passenger's hand. *Louisville & N. R. Co. v. Church (Ala.)*, 168.

Snow and ice, duty to remove from platforms of train between stations. *Riley v. Rhode Island Co. (R. I.)*, 129.

Snow and ice on car steps, insufficiency of evidence of negligence with respect to. *Riley v. Rhode Island Co. (R. I.)*, 129.

Vestibuled cars, duty to provide. *Chicago, etc., Co. v. Simpson (Ark.)*, 798.

Vestibuled cars, liability of carrier on account of defects in. *Chicago, etc., Co. v. Simpson (Ark.)*, 798.

Vestibuled rear car, where passenger was not led to believe that its rear platform could be used to ride on, and fell through its open vestibuled door, and was injured, carrier was not liable. *Chicago, etc., Ry. Co. v. Simpson (Ark.)*, 798.

Vestibule trains, duty of carrier to furnish. *Pittsburgh, etc., Ry. Co. v. Schepman (Ind.)*, 306.

Warn and Instruct.

Carrier is, as a general rule, under no obligation to exercise special supervision and guidance over a passenger who does not disclose the fact that he is ignorant of the situation of the

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tracks or station grounds, though the night is dark and cloudy and the station grounds new and incomplete. *Pere Marquette R. Co. v. Strange* (Ind.), 66.

Duty to warn passenger on running board of street car of possible danger from obstruction in street. *Hinckley v. City of Danbury* (Conn.), 652.

Willful misconduct or neglect causing passenger's death while he was riding on caboose car, insufficiency of evidence of. *McLean v. Atlantic Coast Line R. Co.* (S. Car.), 76.

Who Are Passengers.

Before boarding, and after alighting from train. *Powell v. Philadelphia & R. Ry. Co.* (Pa.), 536.

Commencement of relation. *Pere Marquette R. Co. v. Strange* (Ind.), 66.

Effect of fact that carrier is chargeable with notice of person's bona fide intention to take passage on train. *McFeat v. Philadelphia, etc., R. Co.* (Del.), 254.

Not necessary to have ticket, or to be actually on train. *McFeat v. Philadelphia, etc., R. Co.* (Del.), 254.

Person employed as cook by foreman of railroad's bridge crew injured while at work by sudden stoppage of train. *Tinkle v. St. Louis & S. F. R. Co.* (Mo.), 470.

Person, having entered upon the premises of a carrier for purpose of taking train, for which he purchased a ticket, was, while approaching such train, a passenger. *Pere Marquette R. Co. v. Strange* (Ind.), 66.

Shipper's agents accompanying shipments. *Chicago, etc., Ry. Co. v. Hostetter* (Ind.), 242.

Sleeping car company's employees. *Lewis v. Pennsylvania R. Co.* (Pa.), 59.

Volunteer assisting train crew in making up freight train was not a passenger while riding on such train. *Clarke v. Louisville & N. R. Co.* (Ky.), 542.

Where passenger after alighting from train enters the station to wait for a friend, she is entitled to use the station for reasonable time. *Powell v. Philadelphia* (Pa.), 536.

Where passenger alights from train, crosses track to station on other side to meet a friend waiting for her, and in so doing crosses highway, she does not cease to be a passenger because she has passed over such highway. *Powell v. Philadelphia & R. Ry. Co.* (Pa.), 536.

CHILDREN.

See CARRIERS OF PASSENGERS; CROSSINGS; LICENSES.

Care due from trainmen to child trespassing on track. *O'Bannion's Adm'r v. Southern Ry. Co.* (Ky.), 416.

Damages.

\$12,000 allowed father and mother for death and suffering of two children, aged six and ten. *Cherry v. Louisiana & A. Ry. Co.* (La.), 746.

Insufficiency of evidence to show that trainmen discovered child on track in time. *O'Bannion's Adm'r v. Southern Ry. Co.* (Ky.), 416.

Lookouts, duty of trainmen to maintain for protection of trespassing children. *O'Bannions' Adm'r v. Southern Ry. Co.* (Ky.), 416.

No common law duty on part of railroad to build fences or erect barriers at places other than crossings to exclude persons, whether children or adults, from its tracks. *New York, etc., Co. v. Price* (C. C. A.), 445.

COMMON CARRIERS.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CONNECTING CARRIERS; CONSTITUTIONAL LAW; BILLS OF LADING.

Act of God.

Destruction of goods, within the time within which the carrier agreed to transport them to their destination, by an act of God will excuse their nondelivery. *Sauter v. Atchison, etc., Ry. Co. (Kan.)*, 605.

Contributory Negligence.

Duty of shipper to inspect car furnished by carrier, and his right to assume that carrier would not have directed the placing of the freight in the car unless it was suitable. *Cleveland, etc., Ry. Co. v. Louisville Tin & Stove Co. (Ky.)*, 672.

Conversion.

Carrier not liable as for conversion, in action brought by true owner of the freight, unless latter intervenes before it is delivered to the consignee, and demands it. *Shellnut v. Central of Georgia Ry. Co. (Ga.)*, 276.

Damages.

Admissibility of evidence that hotel to which delayed trunk was to be delivered by express company and where plaintiff was to stop, was a high-priced hotel, etc.; that many social functions were conducted there for benefit of guests, and that there were tennis courts and golf links for the use of guests which plaintiff desired to use, had used on former occasions, and which he did use after receiving the apparel contained in the trunk. *James v. American Express Co. (N. J.)*, 163.

Complaint, in action for delay in delivery of car load of stoves intended for sale, was insufficient to authorize recovery of special damages. *Pilcher v. Central of Ga. Ry. Co. (Ala.)*, 355.

Delay in transportation, effect of notice of probability of special loss from. *Pilcher v. Central of Ga. Ry. Co. (Ala.)*, 355.

Measure of damages for delay in delivering goods as affected by carrier's knowledge of special circumstances. *Pilcher v. Central of Ga. Ry. Co. (Ala.)*, 355.

Notice to carrier of special damages which will result from delay in delivery of goods, effect of when given after execution of contract of shipment. *Pilcher v. Central of Georgia Ry. Co. (Ala.)*, 355.

Degree of Care.

Act of God, carrier was not responsible for injuries caused by. *Briggs v. Durham Traction Co. (N. Car.)*, 324.

No defects in cars will excuse carrier from liability for injury to freight by the elements. *Cleveland, etc., Ry. Co. v. Louisville Tin & Stove Co. (Ky.)*, 672.

Unless the delivery of goods to a carrier is for immediate transportation, it is a mere depository or bailee. *St. Louis, etc., Ry. Co. v. Citizens' Bank (Ark.)*, 290.

Delay.

Computation of time allowed for transportation of freight by N. Car. Revisal 1905, § 2632. *Wall-Huske Co. v. Southern Ry. Co. (N. Car.)*, 318.

Construction of N. Car. Revisal 1905, § 2632, imposing penalty on carrier for delay in transportation of freight. *Wall-Huske Co. v. Southern Ry. Co. (N. Car.)*, 318.

COMMON CARRIERS—Continued.

Mere statement of station agent that the freight shall arrive at proposed destination at a certain time, does not constitute a contract to carry it within such time. *Sauter v. Atchison, etc., Ry. Co. (Kan.)*, 605.

Termination of transportation so as to relieve carrier from liability for penalty for delay prescribed by N. Car. Revisal, § 2632. *Wall-Huske Co. v. Southern Ry. Co. (N. Car.)*, 318.

Under N. Car. Revisal 1905, § 2632, imposing penalty on carrier for delay in transportation of freight, the carrier is entitled to two free days at the initial point. *Wall-Huske Co. v. Southern Ry. Co. (N. Car.)*, 318.

Whether carrier entitled to allowance in the computation of penalties for delay imposed by N. Car. Revisal, § 2632, for an intervening Sunday. *Wall-Huske Co. v. Southern Ry. Co. (N. Car.)*, 318.

Limiting Liability.

Bill of lading showing limited liability must be executed and delivered at the time the carrier accepts the shipment, or promptly mailed in due course of business, before a loss occurs. *Harris v. Great Northern Ry. Co. (Wash.)*, 265.

Exemption of carrier from liability for failure to furnish proper cars for transportation of freight, how effected. *Cleveland, etc., Ry. Co. v. Louisville Tin & Stove Co. (Ky.)*, 672.

Limiting extent of liability for negligence by agreed valuations. *Southern Express Co. v. Gibbs (Ala.)*, 271.

Right of carrier acting as warehouseman in receiving goods in its parcel room to limit its liability to \$10 in case of loss of the goods, so that a receipt containing such limitation was binding upon the owner. *Terry v. Southern Ry. Co. (S. Car.)*, 534.

When, in absence of agreement, ordinary liability of a carrier is assumed, and the law will imply that the usual freight rate is the one which was intended. *Harris v. Great Northern Ry. Co. (Wash.)*, 266.

Where the published tariff provides two rates, one with the carrier's ordinary liability, and the other a lesser rate, by reason of liability being limited, and the shipper makes no selection of rate, it is proper for the carrier to elect which rate shall apply. *Harris v. Great Northern Ry. Co. (Wash.)*, 265.

Termination of Liability.

Warehouseman, beginning of carrier's liability as. *Wall-Huske Co. v. Southern Ry. Co. (N. Car.)*, 318.

Warehousemen.

Plaintiff need not show that loss of parcel deposited in defendant railroad's parcel room was due to defendant's negligence. *Terry v. Southern Ry. Co. (S. Car.)*, 534.

What law governs contract of carriage. *Southern Express Co v. Gibbs (Ala.)*, 271.

CONCURRENT NEGLIGENCE.

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CONNECTING CARRIERS.

Connecting carrier as party to initial carrier's contract, under S. Car. St. at Large, p. 1, and liable to shipper for exacting excessive freight charges. *Reynolds & Craft v. Seaboard A. L. Ry. (S. Car.)*, 340.

Connecting carrier, who is party to a contract of through shipment made by initial carrier, having authority to make such contract,

CONNECTING CARRIERS—Continued.

- is bound to pay back to shipper any excess of freight charges received. *Reynolds & Craft v. Seaboard A. L. Ry. (S. Car.)*, 340.
- Duty of terminal carrier to keep freight safely after receiving it as affected by fact that it was loaded in cars without its knowledge or consent. *Cleveland, etc., Ry. Co. v. Louisville Tin & Stove Co. (Ky.)*, 672.
- Freight rates fixed by initial carrier issuing through bill of lading, whether connecting carrier bound by contract as to at common law. *Reynolds & Craft v. Seaboard A. L. Ry. (S. Car.)*, 340.

Limiting Liability.

- Connecting carrier permitting freight to remain in its warehouse for 49 days before forwarding it, because of a shortage of cars, without notifying the shipper, was responsible for loss of the freight by reason of the burning of the warehouse, although the bill of lading provided that no carrier should be liable for the loss of the goods by fire. *Erie R. Co. v. Star Crescent Milling Co. (C. C. A.)*, 641.

CONSTITUTIONAL LAW.

- See CARRIERS OF LIVE STOCK; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACTS; FEDERAL JURISDICTION; FENCES; INTERSTATE COMMERCE; RAILROADS; RAILROADS IN STREETS; STREET RAILWAYS; TAXATION; TICKETS AND FARES.
- Pa. Act April 4, 1868, exempting railroad companies from liability for personal injuries and death in a particular class of cases, vested in railroad companies a right to exemption in such cases, which the legislature may not interfere with by repeal of the act. *Lewis v. Pennsylvania R. Co. (Pa.)*, 59.
- Pa. Act June 10, 1907, repealing Act April 4, 1868, exempting railroad companies from liability for personal injuries and death in a particular class of cases, does not affect the exemption of railroad companies from liability in cases in which the cause of action accrued prior to the passage of the repealing act. *Lewis v. Pennsylvania R. Co. (Pa.)*, 59.
- Power of General Assembly of North Carolina to impose penalties for delay in transportation of interstate freight. *Wall-Huske Co. v. Southern Ry. Co. (N. Car.)*, 318.

CONTRACTS.

- See SPURS AND SIDE TRACKS.

CONTRIBUTORY NEGLIGENCE.

- See ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF PASSENGERS; CROSSINGS; FIRES SET BY LOCOMOTIVES; IMPUTED NEGLIGENCE; NEGLIGENCE; STOCK, INJURIES TO; TICKETS AND FARES.
- Acting in emergencies. *Davis v. Chicago, etc., Ry. Co. (C. C. A.)*, 183.
- Choice of alternative involving risk, in an emergency. *McFeat v. Philadelphia, etc., R. Co. (Del.)*, 254.
- May become question of law for the court. *Farrier v. Colorado Springs, etc., Ry. Co. (Colo.)*, 110.
- Only necessary to show some negligence by plaintiff directly contributing, as a proximate cause, to the injury, and without which it would not have happened. *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 76.
- Person negligently walking into danger which the observance of due care would have enabled him to avoid. *McFeat v. Philadelphia, etc., R. Co. (Del.)*, 254.

CORPORATIONS.

See RAILROADS; STREET RAILWAYS.

CROSSINGS.

See ACTIONS; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; INTERSTATE COMMERCE; RAILROADS IN STREETS; STREET RAILWAYS.

Attempting to cross track with knowledge of train's approach and negligent speed of train and negligence in failing to check speed, certain requested instruction as to effect of was properly refused as a request to instruct jury that certain facts would have constituted negligence on part of deceased. *Southern Ry. Co. v. Grizzle* (Ga.), 715.

Contributory Negligence.

Driving horse close to railroad track before stopping to look and listen, where horse became frightened by train, and crossed track in front of train and was killed. *Potter v. Pennsylvania R. Co.* (Pa.), 443.

Intestate, killed by being thrown from wagon in consequence of defect in crossing, was not negligent, as matter of law, because he attempted to turn on crossing, and did not approach it at right angles. *Sample v. Chicago, B. & Q. R. Co.* (Ill.), 434.

Mere fact that passenger in vehicle could, had he looked or listened, have noticed an approaching train, is not conclusive that he was negligent in failing to do so. *Liabraaten v. Minneapolis, etc., Ry. Co.* (Minn.), 178.

Precluded person in vehicle, sitting beside driver, from recovering for an injury received by jumping out of the vehicle to avoid danger from an approaching train, which they should have discovered in time, but which they did not see until the horse had stepped upon track. *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 183.

Defect in crossing, railroad was negligent in permitting it to remain, and it was proximate cause of intestate's death, who was killed by being thrown from wagon. *Sample v. Chicago, B. & Q. R. Co.* (Ill.), 434.

Duty of railroad to make street crossing of sufficient width. *Sample v. Chicago, B. & Q. R. Co.* (Ill.), 434.

Gates.

Failure to construct gates was not proximate cause of injury to boy who crossed over tracks at street crossing for purpose of catching and riding upon passing freight train. *Mehalek v. Minneapolis, etc., Ry. Co.* (Minn.), 151.

Lookouts.

Railroad was not negligent in failing to have a third person to assist fireman to keep lookout while he was otherwise engaged. *Louisville & N. R. Co. v. Gilmore's Adm'r* (Ky.), 412.

Railroad was not negligent merely because fireman withdrew his lookout for pedestrians to coal engine, though view of engineer was obstructed. *Louisville & N. R. Co. v. Gilmore's Adm'r* (Ky.), 412.

Mutual rights of railroad and public with respect to use of highway crossing. *Webster v. Chicago, etc., Ry. Co.* (C. C. A.), 460.

Right of trainman to act on presumption that pedestrian will not step in front of approaching train. *Louisville & N. R. Co. v. Gilmore's Adm'r* (Ky.), 412.

Signals.

Common law duty of railroad to all persons, whether strangers

CROSSINGS—Continued.

- or employees, when about to send a car over recognized street crossings in its yards. *Chicago, etc., Ry. Co. v. Donovan* (C. A.), 724.
- Duty to give in absence of statutory requirement. *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 195.
- Duty to give where engine starts from point within the statutory 80-rod limit. *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 195.
- Failure to give must be proximate cause of injury in order to be negligence for which railroad is liable. *Southern Ry. Co. v. Daves* (Va.), 455.
- Failure to give proper train signals must be proximate cause of accident. *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 195.
- Jury's finding of actionable negligence in failing to give proper signals was warranted. *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 195.
- Proximate cause of accident where there was failure to give statutory signals and also negligence on part of driver of team in approaching the crossing to a point where the approach of the train caused his horses to become uncontrollable, so that his team collided with the train. *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 195.

Speed.

- Duty to use extra precautions in running train to public crossing where view is obstructed by car, even though the crossing is within the railroad's yard. *Cherry v. Louisiana & A. Ry. Co.* (La.), 746.
- Operating passenger train at rate of 30 miles and without a head light across a highway in the country was negligence. *Gorton v. Harmon* (Mich.), 204.

Stop, Look, and Listen.

- Care required of highway traveler that man of ordinary caution under like circumstances would give. *McFeat v. Philadelphia, etc., R. Co.* (Del.), 254.
- Duty of person who borrowed the horse to stop, look, and listen before crossing track, although person who borrowed the wagon was driving. *Wade v. Western Maryland R. Co.* (Pa.), 238.
- Ordinarily, driver of team is not bound to stop it upon approaching a railroad crossing. *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 195.
- Presumption that two men, when driving a team and killed at a railroad crossing, stopped, looked and listened was overcome by testimony of the only witness who saw the accident. *Wade v. Western Maryland R. Co.* (Pa.), 238.
- Question for jury whether driver of team should have stopped before approaching the railroad crossing. *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 195.
- Rule requiring person to look and listen for trains is not applicable, in all its force, to passenger in vehicle. *Liabraaten v. Minneapolis, etc., Ry. Co.* (Minn.), 178.
- Traveler about to cross four railroad tracks exercises all due legal care if he stops and listens before venturing upon the first track. *Cherry v. Louisiana & A. Ry. Co.* (La.), 746.
- Traveler by daylight is not required to stop where view of trains is not obstructed. *Gorton v. Harmon* (Mich.), 204.

CROSSINGS OF RAILROADS.

See EMINENT DOMAIN.

The crossing of plaintiff's track by the rails and cars of another

CROSSINGS OF RAILROADS—Continued.

company was not an appropriation of the property of the former to the use of the latter, but merely a mode of exercising the public right of transit over the street. *Louisville & N. R. Co. v. New Orleans Terminal Co. (La.)*, 373.

Under certain ordinances, providing for payment of the incidental expense where street railways cross each other, such expense should be divided between steam railroads crossing each other. *Louisville & N. R. Co. v. New Orleans Terminal Co. (La.)*, 373.

DAMAGES.

See BAGGAGE; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; COMMON CARRIERS; CROSSINGS OF RAILROADS; EMINENT DOMAIN; PERSONAL INJURIES.

DEATH BY WRONGFUL ACT.

See CROSSINGS.

Damages.

Value of wife's services, less cost of her maintenance, was the measure of damages. *Gorton v. Harmon (Mich.)*, 204.

Right of action in behalf of widow or next of kin, under Kan. Gen. St. 1901, § 4871. *Sewell v. Atchison, etc., Ry. Co. (Kan.)*, 86.

DUEBILLS.

See BILLS OF LADING.

ELECTRIC RAILWAYS.

See CARRIERS OF PASSENGERS.

EMINENT DOMAIN.

See CROSSINGS OF RAILROADS; RAILROADS IN STREETS; RIGHT OF WAY.

Constitutional provision that private property shall not be taken or damaged for public or private use without just compensation being first made and paid into court for the owners applies to property owned by railroad company. *State v. Northern Pac. Ry. Co. (Wash.)*, 681.

Damages.

Cost of maintaining and operating interlocking device required to be installed by relator railroad, defendant railroad having right to be made whole for all damages directly ensuing by reason of the crossing of its tracks by the tracks of the other company. *State v. Northern Pac. R. Co. (Wash.)*, 681.

Power of railroad to appropriate property for the purpose of diverting a watercourse, time of exercising. *Cleveland, etc., Ry. Co. v. South (Ohio)*, 379.

Whether it was proper, in proceedings to acquire right to make grade crossing over tracks of another railroad company, to provide that the interlocking device directed to be installed should cover additional tracks contemplated by defendant. *State v. Northern Pac. Ry. Co. (Wash.)*, 681.

EMPLOYERS' LIABILITY ACTS.

See CONSTITUTIONAL LAW; FELLOW SERVANTS.

Assumption of Risk.

Where brakeman is killed while uncoupling cars not provided with automatic couplers, as required by federal statute, question of assumed risk is not in issue. *York v. St. Louis, etc., Ry. Co. (Ark.)*, 466.

EMPLOYERS' LIABILITY ACTS—Continued.

Complaint under safety appliance law of Congress to recover penalty for hauling a car in moving interstate traffic, in violation of section 2, etc., sufficiency of. *United States v. Denver & R. G. R. Co.* (C. C. A.), 490.

Compliance with federal statute prohibiting the use in interstate commerce of freight cars which do not comply with the standard fixed as to height of drawbars. *St. Louis, etc., R. Co. v. Taylor* (U. S.), 761.

Drawbars of loaded and unloaded freight cars, whether Federal safety appliance act of March 2, 1893, § 5, requires them to be of uniform height. *St. Louis, etc., R. Co. v. Taylor* (U. S.), 761.

Power conferred on Congress by the interstate commerce clause of the federal constitution to regulate the relation of master and servant, etc. *State v. Chicago, etc., Ry. Co.* (Wis.), 16.

Safety appliance law of Congress imposes upon a railroad company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end. *United States v. Atchison, etc., Ry. Co.* (C. C. A.), 13.

Scope and validity of act Cong. March 4, 1907, c. 2939, making it unlawful for any common carrier subject to the act to permit any employee subject to the act to remain on duty for a longer period than a specified time, etc. *State v. Chicago, etc., Ry. Co.* (Wis.), 16.

State's right to protect its citizens from perils resulting from excessive hours of labor by railroad employees is in no way impaired by the federal constitution, except as such legislation shall restrain interstate commerce in a respect in which Congress has deemed wise to regulate it. *State v. Chicago, etc., Ry. Co.* (Wis.), 16.

Validity of state statute prohibiting any corporation operating a line of railroad in whole or in part in the state from requiring or permitting a telegraph operator, including train dispatcher, to remain on duty for more than one period of 8 consecutive hours, etc., as affected by the interstate commerce clause of the federal constitution. *State v. Chicago, etc., Ry. Co.* (Wis.), 16.

EVIDENCE.

See CARRIERS; CROSSINGS; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; NEGLIGENCE; STOCK. INJURIES TO; TICKETS AND FARES; WITNESSES.

Expert testimony upon question whether railroad was negligent in constructing and maintaining its roadbed, admissibility of. *Morse v. Chicago, etc., Co.* (Neb.), 396.

Photographs of place of accident. *Sample v. Chicago, B. & Q. R. Co.* (Ill.), 434.

Speed of trains. *Tinkle v. St. Louis & S. F. R. Co.* (Mo.), 470.

EXPRESS COMPANIES.

See CARRIERS OF PASSENGERS; COMMON CARRIERS.

FEDERAL JURISDICTION.

Review by Federal Supreme Court of decision of state court holding invalid state law, alleged to constitute a contract. *Mobile, etc., R. Co. v. Mississippi* (U. S.), 629.

State court, by resting its decision on certain grounds, in a suit to require railway companies to construct their railroad through a specified county seat, did not use a mere pretext to avoid determination of the Federal questions arising in the case under

FEDERAL JURISDICTION—Continued.

the contract and commerce clause of the Federal Constitution. *Mobile, etc., R. Co. v. Mississippi* (U. S.), 629.

Waiver by railroad companies of their charter rights to change the line of a narrow-gauge railroad, and estoppel to revoke such waiver, whether local or Federal questions. *Mobile, etc., R. Co. v. Mississippi* (U. S.), 629.

Whether or not legislative power is unconstitutionally delegated to the American Railways Association and the Interstate Commerce Commission by certain provision of the safety appliance act of March 2, 1893, § 5, is a Federal question. *St. Louis, etc., R. Co. v. Taylor* (U. S.), 761.

FELLOW SERVANTS.

See MASTER AND SERVANT.

Conductor and motorman of street car, being fellow servants, owed to each other a much less degree of care to prevent injury from obstructions in street than they owe passengers. *Hinckley v. City of Danbury* (Conn.), 652.

Degree of care required in selecting competent fellow servants. *Ballard's Adm'x v. Louisville & N. R. Co.* (Ky.), 494.

Motorman was not bound to assume that conductor did not observe obvious danger from obstruction in street. *Hinckley v. City of Danbury* (Conn.), 652.

Negligence of engineer, in insufficiently repairing hand hold on engine tender, was not that of injured brakeman's fellow servant. *Beach v. Bird, etc., Co.* (Wis.), 6.

Who Are.

Sleeping car company's employees and trainmen. *Lewis v. Pennsylvania R. Co.* (Pa.), 59.

Sleeping car conductor, killed in an accident in which his train ran into freight cars which had buckled on next track, was fellow servant of trainmen on the freight train, under certain statute. *Lewis v. Pennsylvania R. Co.* (Pa.), 59.

FENCES.

See CHILDREN; STOCK, INJURIES TO.

Nature and effect of statutes requiring railroads to fence their tracks. *New York, etc., R. Co. v. Price* (C. C. A.), 445.

Statutes requiring railroad to fence its tracks is justified as an exercise of state's police power. *New York, etc., R. Co. v. Price* (C. C. A.), 445.

FIRES SET BY LOCOMOTIVES.

Assumption of risk by owner of property adjacent to railroad right of way of loss by fire started without negligence on part of railroad, which risk is increased by his permitting his premises to remain in a highly combustible state, or by locating his buildings in an exposed portion with reference to flying sparks. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Care required of railroad with respect to furnishing machinery and operating its engines. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Contributory Negligence.

Duty of one owning property adjacent to railroad right of way to stand guard to protect it from negligence of railroad. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Duty of owner to save his property. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Only negligence of property owner which precludes a recovery

FIRES SET BY LOCOMOTIVES—Continued.

against railroad, what constitutes. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Owner of property is not required to remove combustible matter from it to provide against the consequences of probable negligence of the railroad. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Permitting premises adjacent to railroad right of way to remain in a highly combustible state, or locating buildings in an exposed situation with reference to flying sparks. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Property owner not required to keep it in such condition as to guard against the negligence of the railroad. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Right of owner of property adjacent to railroad right of way to use it in any lawful manner. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Evidence.

Fact that locomotives frequently emit sparks causing fires, effect of. *Staples v. Boston & M. R. R.* (N. H.), 454.

Origin of fire, sufficiency of circumstantial evidence of. *Staples v. Boston & M. R. R.* (N. H.), 454.

Testimony of several witnesses may justify jury in finding that a train passed about two hours before the fire in question, though train sheets indicate that the last train before the fire passed the point in question some four hours before. *Staples v. Boston & M. R. R.* (N. H.), 454.

Testimony that witnesses saw a train throwing out large volumes of sparks. *Southern Ry. Co. v. Darwin* (Ala.), 209.

Exemption from Liability.

Fact that plaintiffs, when they stored cotton seed in house erected on defendant railroad's right of way, knew of contract between railroad and person who erected the house, did not effect their right to recover. *Devlin v. Charleston & W. C. Ry. Co.* (S. Car.), 215.

Nonsuit properly refused. *Devlin v. Charleston & W. C. Ry. Co.* (S. Car.), 215.

Presumption of Negligence.

Plaintiff, after showing that the fire was caused by the engine in question, has nothing to do until the railroad has reasonably shown that the engine was properly built and was not in a defective condition, and that the throwing of sparks was not caused by careless management. *Southern Ry. Co. v. Darwin* (Ala.), 209.

FOREIGN CORPORATIONS.

See RAILROADS.

FORFEITURE.

See STATIONS AND DEPOTS.

FRANCHISES.

See RAILROADS.

FRIGHT.

See PERSONAL INJURIES.

FRIGHTENING TEAMS.

See CROSSINGS.

Right to leave hand car upon highway near crossing. *Webster v. Chicago, etc., Ry. Co.* (C. C. A.), 460.

HOSPITALS.

See MASTER AND SERVANT.

IMPUTED NEGLIGENCE.

See CROSSINGS.

Negligence of driver of ice wagon could not be imputed to rear man on it, who was injured in collision between the wagon and street car. *Paducah Traction Co. v. Sine* (Ky.), 755.

Where guest sat beside driver and made no objection when the latter negligently drove upon track in front of approaching train, such negligence is imputable to him. *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 183.

INDEPENDENT CONTRACTORS.

See STOCK, INJURIES TO.

Liability of railroad company for negligence of contractor's employees. *Missouri, etc., R. Co. v. Ferguson* (Okl.), 27.

INJUNCTION.

See JUDICIAL SALES; RIGHT OF WAY; STREET RAILWAYS.

INTERSTATE COMMERCE.

See EMPLOYERS' LIABILITY ACTS; FEDERAL JURISDICTION.

Rebates.

A device or contrivance, secret or fraudulent in its nature, is not essential to sustain conviction of shipper for violating the Elkins act of Feb. 19, 1903. *Armour Packing Co. v. United States* (U. S.), 517.

Constitutionality of the Elkins act of Feb. 19, 1903. *Armour Packing Co. v. United States* (U. S.), 517.

Contract fixing former transportation rate as a defense to prosecution of shipper for accepting rebate in violation of the Elkins act of Feb. 19, 1903. *Armour Packing Co. v. United States* (U. S.), 517.

Defenses to prosecution of shipper for accepting rebate in violation of the Elkins act of Feb. 19, 1903. *Armour Packing Co. v. United States* (U. S.), 517.

Indictment charging shipper with accepting rebate in violation of the Elkins act of Feb. 19, 1903, sufficiency of. *Armour Packing Co. v. United States* (U. S.), 517.

Jurisdiction of offense of shipper in violating the Elkins act of Feb. 19, 1903. *Armour Packing Co. v. United States* (U. S.), 517.

Shipments embraced in provisions of the Elkins act of Feb. 19, 1903. *Armour Packing Co. v. United States* (U. S.), 517.

Legislative power is not unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by certain provision of the safety appliance act of March 2, 1893, § 5. *St. Louis, etc., R. Co. v. Taylor* (U. S.), 761.

State Interference.

Checking speed of locomotives at public crossings, constitutionality of statute requiring. *Southern Ry. Co. v. Grizzle* (Ga.), 715.

Power of state to control the conduct of individuals therein for safety of the community as affected by commerce clause of the federal constitution. *State v. Chicago, etc., Ry. Co.* (Wis.), 16.

Requiring railroad companies to operate a particular line, whether interstate commerce is burdened by. *Mobile, etc., R. Co. v. Mississippi* (U. S.), 629.

JUDICIAL NOTICE.

Of territory, density of population, and numerous mill towns along an electric railway route between certain towns. *Funderburg v. Augusta & A. Ry. Co. (S. Car.)*, 281.

JUDICIAL SALES.

Upon hearing of application for injunction by railroad company having possession of a freight car of a nonresident railroad company, to prevent the sale of such car under an attachment sued out by a creditor of the latter company, it was not error to grant such injunction conditioned upon plaintiff giving bond to return the car to proper officers of the court after its contract right to use the car had expired. *Southern Ry. Co. v. Brown (Ga.)*, 717.

JURISDICTION.

See **FEDERAL JURISDICTION.**

LAST CLEAR CHANCE.

See **NEGLIGENCE.**

LEASES AND RUNNING POWERS.

Lessee assumes duty of maintaining railroad so as not to injure adjoining proprietors. *Morse v. Chicago, etc., Ry. Co. (Neb.)*, 396. Liabilities of defendant for negligence of another company in running cars over defendants' line. *O'Bannion's Adm'r v. Southern Ry. Co. (Ky.)*, 416.

Power of one railroad company to lease its road or other property to another railroad corporation. *American Lumber Co. v. Tombigbee Valley R. Co. (Ala.)*, 47.

Validity of grant by railroad company to purely private business corporation of right to use its road to an extent which may exclude all other uses. *American Lumber Co. v. Tombigbee Valley R. Co. (Ala.)*, 47.

LICENSEES.

See **STATIONS AND DEPOTS; TRESPASSERS.**

Care due from railroad to persons going upon its station platform upon business or as mere licensees. *Rowley v. Chicago, etc., Ry. Co. (Wis.)*, 732.

Invitation by implication to ride on freight trains is not sustained by omission of flagman and trainmen to pursue and drive away boys who attempt to steal rides while train is passing street crossing. *Mehalek v. Minneapolis, etc., Ry. Co. (Minn.)*, 151.

Right of bare licensee to abandon the license. *Selectmen v. Citizen's Elec. St. R. Co. (Mass.)*, 382.

Who Are.

Mere acquiescence by railroad in use by public of its right of way, effect of. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.

Person employed as cook by foreman of railroad's bridge crew. *Tinkle v. St. Louis & S. F. R. Co. (Mo.)*, 470.

LICENSES.

See **TAXATION.**

LOCAL ASSESSMENTS.

Railroad right of way abutting on a street is benefited by the improvement of the street, if the abutting property would be benefited, on it being used for other than railroad purposes. *City of Seattle v. Seattle & M. R. Co. (Wash.)*, 50.

MASTER AND SERVANT.

See ACCIDENTS ON TRACKS; CROSSINGS; EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; INDEPENDENT CONTRACTS; SLEEPING CAR COMPANIES.

Appliances.

Actionable negligence in failing to promptly replace lost coupling pin, insufficiency of evidence of. *Southern Ry. Co. v. Moore* (Va.), 487.

Actionable negligence on part of master to fail to use ordinary care to provide and maintain reasonably safe appliances. *Southern Ry. Co. v. Moore* (Va.), 487.

Automatic couplers, injuries to brakemen while uncoupling cars are the natural and probable consequences of failing to provide. *York v. St. Louis, etc., Ry. Co.* (Ark.), 466.

Certain appliance was not one requiring constant renewal and adjustment on account of daily wear and tear, and it was, therefore, railroad's duty to inspect it. *Pennsylvania R. Co. v. Forstall* (C. C. A.), 1.

Compressed air hose used in machine shop to blow away filings or cuttings is not a dangerous agency which must be guarded by master to prevent its being used by unfit employees. *Ballard's Adm'x v. Louisville & N. R. Co.* (Ky.), 494.

Where brakeman was injured by reason of a defective push pole on engine, defendant was negligent for failing to furnish a safe appliance, although an extra pole, not shown to have been in good condition, was in the yard, it being the duty of defendant, and not plaintiff, to install such extra pole on engine. *Pennsylvania R. Co. v. Forstall* (C. C. A.), 1.

Assumption of Risk.

Brakeman was justified in remaining in the employment a reasonable time after the promise to repair, and in assuming that the repairs had been made in his absence, and he, therefore, did not assume the risk, in the absence of proof that he knew that such promise had not been fulfilled. *Pennsylvania R. Co. v. Forstall* (C. C. A.), 1.

Defense of is never available unless it rests on contract. *Tinkle v. St. Louis & S. F. R. Co.* (Mo.), 470.

Distinction between ordinary and extraordinary risks. *Chicago, etc., Ry. Co. v. Donovan* (C. C. A.), 724.

Employee injured by reason of his foot being caught between ties had assumed the risk. *Galloway v. Chicago, etc., Ry. Co.* (Ill.), 781.

Negligence of master. *Tinkle v. St. Louis & S. F. R. Co.* (Mo.), 470.

Negligence of master, effect of servant's knowledge of. *Chicago, etc., Ry. v. Donovan* (C. C. A.), 724.

Opportunity of knowing of defect in turntable. *Galloway v. Chicago, etc., Ry. Co.* (Ill.), 781.

Person employed as cook by foreman of railroad's bridge crew injured while train upon which she was at work was being hauled from one place to another. *Tinkle v. St. Louis & S. F. R. Co.* (Mo.), 470.

Plaintiff is not required to negative assumption of risk in his complaint. *Pennsylvania R. Co. v. Forstall* (C. C. A.), 1.

Promise of master to employee working on locomotive to repair defect in track on return of section boss, effect of. *Morgan v. Rainer Beach Lumber Co.* (Wash.), 549.

Promise of master to person working on locomotive to repair track, effect of as affected by imminence of danger. *Morgan v. Rainer Beach Lumber Co.* (Wash.), 549.

MASTER AND SERVANT—Continued.

Switchman killed by reason of collision between car on the first night of his employment in an unlighted yard. *Travis v. Kansas City So. Ry. Co. (La.)*, 730.

Youth, immaturity, and inexperience of employee, injured by reason of defective turntable, were to be considered. *Galloway v. Chicago, etc., Ry. Co. (Ill.)*, 781.

Authority of foreman of railroad's bridge crew to employ person to board hands need not be proven by direct or positive evidence. *Tinkle v. St. Louis, etc., R. Co. (Mo.)*, 470.

Burden of Proof.

Servant injured by reason of alleged defectively constructed turntable, what constituted his burden of proof, in action against his employer. *Galloway v. Chicago, etc., Ry. Co. (Ill.)*, 781.

Contributory Negligence.

Brakeman walking backwards with motion of car, while uncoupling it. *York v. St. Louis, etc., Ry. Co. (Ark.)*, 466.

Custom of cook or railroad's bridge crew to stand up to work while train was in motion. *Tinkle v. St. Louis, & S. F. R. Co. (Mo.)*, 470.

Custom of cook of railroad's bridge crew to stand up and work while train was moving, admissibility of evidence of. *Tinkle v. St. Louis & S. F. R. Co. (Mo.)*, 470.

Duty of servant to inspect appliance before using it to see if promised repairs have been properly made. *Beach v. Bird, etc., Co. (Wis.)*, 6.

In doing work in a manner contrary to orders, dangerous, and contributing to his injury, was question for jury. *Morgan v. Rainer Beach Lumber Co. (Wash.)*, 549.

Of brakeman as affected by failure to provide automatic couplers, as required by statute. *York v. St. Louis, etc., Ry. Co. (Ark.)*, 466.

Of brakeman in using in a certain manner, while train was moving, without inspection, the hand hold of an engine tender, repair of which had been promised and made, but insufficiently. *Beach v. Bird, etc., Co. (Wis.)*, 6.

Of brakeman, in using repaired hand hold on engine tender without close inspection, the tender presenting appearance of being repaired, according to promise made to him, was question for jury. *Beach v. Bird, etc., Co. (Wis.)*, 6.

Custom and Usage.

Master's responsibility for servant's act done in accordance with recognized, but negligent, practice in master's service. *Chicago, etc., Ry. Co. v. Donovan (C. C. A.)*, 724.

Degree of Care.

Care due person employed as cook by foreman of railroad's bridge crew and injured while at work by sudden stoppage of train. *Tinkle v. St. Louis & S. F. R. Co. (Mo.)*, 470.

Care required of master to provide and maintain safe appliances. *Southern Ry. Co. v. Moore (Va.)*, 487.

Required of railroad, as an employer, in inspecting turntables. *Galloway v. Chicago, etc., Ry. Co. (Ill.)*, 781.

Volunteers, care due from railroad to. *Clarke v. Louisville & N. R. Co. (Ky.)*, 542.

Evidence.

Reports of car inspectors concerning condition of coupler alleged to have caused accident in question are admissible to prove notice to their employer railroad of contents of such reports. *Atchison, etc., Ry. Co. v. Burks (Kan.)*, 788.

Reports of car inspectors concerning condition of coupler alleged

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to have caused accident in question, whether admissible as admissions by their employer railroad, in action against latter for personal injuries. *Atchison, etc., Ry. Co. v. Burks* (Kan.), 788.

Fellow Servants.

Repairs by engineer, not made in the progress of the work while he and the injured brakeman were at work, but at night, at request of defendant's superintendent, after the day's work of the brakeman injured was over. *Beach v. Bird, etc., Co.* (Wis.), 6.
Question for jury whether brakeman's injury was caused by the slipping of collar attached to push pole on engine, or by his negligence and that of his fellow servants. *Pennsylvania R. Co. v. Forstall* (C. C. A.), 1.

Relief Associations.

Certain hospital association, together with all its surgeons and physicians, are agents of defendant railroad company, which is liable for their negligence. *Phillips v. St. Louis & S. F. R. Co.* (Mo.), 696.

Certain railroad employers' hospital association was not a charitable institution, within the rule which exempts such institutions from liability for negligence. *Phillips v. St. Louis & S. F. R. Co.* (Mo.), 696.

Liability of railroad for failure of hospital association to competently treat the patients received. *Phillips v. St. Louis & S. F. R. Co.* (Mo.), 696.

Proximate cause where surgeon of railroad hospital system having charge of an insane patient placed him aboard train unattended and without notice to his family, knowing that he would have to find his home in a populous city, and he was run over by a street car. *Phillips v. St. Louis & S. F. R. Co.* (Mo.), 696.

Scope of Employment.

Defendant railroad was liable for assault committed by member of section crew upon plaintiff, while latter was endeavoring to prevent such crew from constructing certain fences on land of plaintiff's employer. *Waler v. Great Northern Ry. Co.* (S. Dak.), 775.

Liability of railroad where apprentice in its machine shop, intending to play a prank, according to his known custom, took a compressed air hose, not committed to his use, and turned it upon a fellow servant, causing his death. *Ballard's Adm'x v. Louisville & N. R. Co.* (Ky.), 494.

Retaining apprentice in employ with knowledge of his habit of turning compressed air hose on other boys as a prank, effect of proof of in action against common master for death of employee resulting from such a prank. *Ballard's Adm'x v. Louisville & N. R. Co.* (Ky.), 494.

Where plaintiff was assaulted by members of defendant's section crew when endeavoring to prevent them from constructing certain fences on land of plaintiff's employer, proof that foreman of the crew was directing the work and giving orders to the men under his charge to erect the fence was sufficient to establish his authority from defendant to do so. *Waler v. Great Northern Ry. Co.* (S. Dak.), 775.

Suddenly stopping train and thereby causing injury to cook of railroad's bridge crew while she was standing up at work, sufficiency of evidence of negligence in. *Tinkle v. St. Louis, etc., R. Co.* (Mo.), 470.

Unblocked frogs, cause of action in favor of injured employee can be predicated on use of. *York v. St. Louis, etc., Ry. Co.* (Ark.), 466.

MASTER AND SERVANT—Continued.**Who Are Employees.**

Employment of trainmen by conductor. *Clarke v. Louisville & N. R. Co. (Ky.)*, 542.

Evidence justified finding that certain section crew were employees of defendant. *Waler v. Great Northern Ry. Co. (S. Dak.)*, 775.

Person assisting in making up freight train was neither an employee nor trespasser, but a volunteer. *Clarke v. Louisville & N. R. Co. (Ky.)*, 542.

Sleeping car company's employees as railroad's employees. *Lewis v. Pennsylvania R. Co. (Pa.)*, 59.

Woman employed by foreman of railroad's bridge crew to board the hands. *Tinkle v. St. Louis, etc., R. Co. (Mo.)*, 470.

Work Place.

Duty to light switch yards as affected by fact that it was the practice of a number of railroads to do so. *Travis v. Kansas City So. Ry. Co. (La.)*, 730.

MEDICAL ATTENTION.

See ACCIDENTS ON TRACKS.

MISCARRIAGE.

See PERSONAL INJURIES.

NEGLIGENCE.

See CARRIERS; CHILDREN; CROSSINGS; EMPLOYERS' LIABILITY ACTS; EVIDENCE; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; INDEPENDENT CONTRACTORS; IMPUTED NEGLIGENCE; LICENSEES; MASTER AND SERVANT; STATIONS AND DEPOTS; STREET RAILWAYS.

Actionable negligence, definition of. *Miller v. Baltimore, etc., R. Co. (Ohio)*, 221.

Actionable negligence, pure accident is not. *McFeat v. Philadelphia, etc., R. Co. (Del.)*, 254.

Burden of Proof.

Mere happening of accident, effect of proof of. *Southern Ry. Co. v. Moore (Va.)*, 487.

Sufficiency of evidence to sustain. *Southern Ry. Co. v. Moore (Va.)*, 487.

Comparative negligence, doctrine of not recognized in South Carolina. *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 76.

Concurrent Negligence.

Joint and several liability where plaintiff's injury resulted for concurrent negligence of driver of ice wagon on which plaintiff was employed and of motorman of defendant's street car. *Paducah Traction Co. v. Sine (Ky.)*, 755.

Inevitable accident, definition of. *Roanoke & Elec. Co. v. Sterrett (Va.)*, 611.

Last Clear Chance.

Contributory negligence will not prevent recovery if it be shown that defendant might, by the exercise of reasonable care, have avoided the consequences of plaintiff's negligence. *Atchison, etc., Ry. Co. v. Baker (Okl.)*, 230.

Liability of railway where motorman, notwithstanding negligence of driver of the ice wagon, could, by the exercise of ordinary

NEGLIGENCE—Continued.

care, have stopped car in time to have prevented the collision. Paducah Traction Co. *v.* Sine (Ky.), 755.
May become question of law for the court. Farrier *v.* Colorado Springs, etc., Ry. Co. (Colo.), 110.

Pleading.

Complaint alleging gross and wanton negligence will support verdict for ordinary negligence. Gorton *v.* Harmon (Mich.), 204.
Necessity of specifying particular acts of diligence which defendant should have employed. Louisville & N. R. Co. *v.* Church (Ala.), 168.
Negligence relied on must be averred in direct and positive terms. Pittsburg, etc., Ry. Co. *v.* Schepman (Ind.), 306.
Wantonness and intentional injury, sufficiency of allegation of existence of. Birmingham Ry., etc., Co. *v.* Lee (Ala.), 132.

Proximate Cause.

It is not necessary in order to render the negligence of a person the proximate cause of an injury, that he be guilty of some active, affirmative negligence. McLean *v.* Atlantic Coast Line R. Co. (S. Car.), 76.
Liability of wrongdoer depends upon. Miller *v.* Baltimore, etc., R. Co. (Ohio), 221.
Pleading. Birmingham Ry., etc., Co. *v.* Lee (Ala.), 132.
When question for jury. Farrier *v.* Colorado Springs, etc., Ry. Co. (Colo.), 110.

PENAL STATUTES.

See COMMON CARRIERS.

PERSONAL INJURIES.

See ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF PASSENGERS; CROSSINGS.

Damages.

Excessive verdict, when new trial may be granted on account of. Beach *v.* Bird, etc., Co. (Wis.), 6.
Medical expenses, right of married woman, in action for her personal injuries, to recover. Tinkle *v.* St. Louis & S. F. R. Co. (Mo.), 470.
Miscarriage, damages awarded on account of were not so great as to show passion and prejudice on part of jury. Morris *v.* St. Paul City Ry. Co. (Minn.), 438.
Miscarriage, what are, and are not, elements of the damages recoverable on account of. Morris *v.* St. Paul City Ry. Co. (Minn.), 438.
Pain and suffering which the mother would have suffered when the child was born in the natural course of events cannot be deducted from the pain and suffering occasioned by the miscarriage, which resulted from defendant's negligence. Morris *v.* St. Paul City Ry. Co. (Minn.), 438.
Verdict for damages in any sum over \$1,000 was excessive. St. Louis, etc., Ry. Co. *v.* Brabbzson (Ark.), 625.
Fright unaccompanied by contemporaneous physical injury, right of recovery for. Miller *v.* Baltimore, etc., R. Co. (Ohio), 221.

POLICE POWER.

See CONSTITUTIONAL LAW; EMPLOYERS' LIABILITY ACTS; FENCES; INTERSTATE COMMERCE; RAILROADS.

PROXIMATE CAUSE.

See BAGGAGE; CONTRIBUTORY NEGLIGENCE; CROSSINGS; NEGLIGENCE.

RAILROAD AID.

Validity of contract by editor for sale of his editorial influence to aid railroad to carry election for issuance by municipalities of railroad aid bonds. *King v. Raleigh, etc., R. Co. (N. Car.)*, 403.

Validity of contracts for money for personal profit to use efforts and influence to carry election to vote railroad aid bonds. *King v. Raleigh, etc., R. Co. (N. Car.)*, 403.

RAILROADS.

See ACTIONS; ARRESTS AND PROSECUTIONS; EMINENT DOMAIN; INTERSTATE COMMERCE; JUDICIAL NOTICE; JUDICIAL SALES; LEASES AND RUNNING POWERS; LOCAL ASSESSMENTS; RAILROAD AID; RIGHT OF WAY; SPURS AND SIDE TRACKS; STREETS RAILWAYS.

- Consolidated railroad corporation was a new corporation. *Parish v. Ulster & D. R. Co. (N. Y.)*, 349.

Contracts of predecessors, liability of corporation purchasing property and franchises of debtor railroad corporation at decree sale, under. *Louisville & N. R. Co. v. New Orleans Terminal Co. (La.)*, 373.

Doing business within the state, defendant foreign corporations were not engaged in, within the meaning of the statute in question; and service of summons upon their agent was, therefore, rightly set aside. *North Wisconsin Cattle Co. v. Oregon S. L. R. Co. (Minn.)*, 55.

Exemption of the several corporations, before their consolidation, from a certain mileage book act, was not a right, privilege, or exemption, under a certain statute, which passed to the consolidated corporation. *Parish v. Ulster & D. R. Co. (N. Y.)*, 349.

Location of main line of railroad, company's officers are sole judges of what is proper or convenient when considering the necessity of changing. *Whalen v. Baltimore & O. R. Co. (Md.)*, 33.

Minn. Rev. Laws 1905, § 4109, subd. 3, relating to service of summons on a foreign corporation, requires that the agent upon whom service is made must be such in fact, and that the corporation must be doing business in the state. *North Wisconsin Cattle Co. v. Oregon S. L. R. Co. (Minn.)*, 55.

No inferences unfavorable to reasonable operation of the franchise of a railroad should be allowed from statutory words susceptible of use in more than one sense. *Kelly v. New York City Ry. Co. (N. Y.)*, 368.

Power of a state to regulate railroads. *Mobile, etc., R. Co. v. Mississippi (U. S.)*, 629.

Railroad as public highway. *Whalen v. Baltimore & O. R. Co. (Md.)*, 33.

Railroad corporation has a right to exist under conditions as favorable as a sound state of policy, a due regard for the public interest, and a reasonable interpretation of the law will permit, and it should not be burdened by unnecessary implication of a legislative meaning beyond what those considerations demand. *Kelly v. New York City Ry. Co. (N. Y.)*, 368.

Right to change location of main line of railroad. *Whalen v. Baltimore & O. R. Co. (Md.)*, 33.

RAILROADS IN STREETS.

See **CROSSINGS; CROSSINGS OF RAILROADS.**

Certain statute confers jurisdiction in equity of a suit by municipality to compel railroad to repair highway under an overhead crossing. *Mayor, etc., v. Pennsylvania R. Co. (N. J.)*, 675.

Certain statute did not authorize highway surveyors to vacate, in the interest of the railroad company, any part of the street or reduce its width. *Mayor, etc., v. Pennsylvania R. Co. (N. J.)*, 675.

Certain statute did not give township authority to grant any dispensation to railroad company with reference to the change of grade of highway crossed by railroad, nor entitle the railroad to maintain pillars and abutments in the street underneath its tracks, and to narrow the crossing. *Mayor, etc., v. Pennsylvania R. Co. (N. J.)*, 675.

Continuing duty of railroad company, under certain statute, to enlarge passageway under its overhead crossing of highway as public accommodation required, until it should reach the full capacity of the highway. *Mayor, etc., v. Pennsylvania R. Co. (N. J.)*, 675.

Constitutionality of statute empowering municipality to compel railroad to properly construct crossings. *Mayor, etc., v. Pennsylvania R. Co. (N. J.)*, 675.

Duty of railroad to keep in repair the passage under its overhead crossing. *Mayor, etc., v. Pennsylvania R. Co. (N. J.)*, 675.

Insufficiency of evidence to show public necessity for removal of columns and abutments supporting railroad track from underneath crossing and the widening of the passage to full width of the street. *Mayor, etc., v. Pennsylvania R. Co. (N. J.)*, 675.

RELIEF ASSOCIATIONS.

See **MASTER AND SERVANT.**

RIGHT OF WAY.

When railroad company in good faith surveys and locates a line of railroad, and proceeds with reasonable diligence to procure a right of way thereover and to construct its road, the courts will protect its survey from encroachments of another railroad company. *Columbia Valley R. Co. v. Portland & S. Ry. Co. (Wash.)*, 390.

SERVICE OF PROCESS.

See **RAILROADS.**

SLEEPING CAR COMPANIES.

See **CARRIERS OF PASSENGERS; TICKETS AND FARES.**

Authority of sleeping car company's agent to waive or alter conditions of railroad company's passenger ticket. *Calhoun v. Pullman Co. (C. C. A.)*, 173.

Presumption of negligence was not raised against railroad company by fact that sleeping car conductor was killed in an accident in which the train he was riding on ran into freight cars which had buckled on the next track. *Lewis v. Pennsylvania R. Co. (Pa.)*, 59.

Responsibility of sleeping car company to railroad's passenger, while he is on sleeping car, for manner in which contract for transportation is performed. *Calhoun v. Pullman Co. (C. C. A.)*, 173.

SPURS AND SIDE TRACKS.

Certain covenant to maintain a turn-out and to stop trains for passengers was one running with the land, while a covenant to leave

SPURS AND SIDE TRACKS—Continued.

- at the siding cars loaded with freight was a personal one. *Whalen v. Baltimore & O. R. Co. (Md.)*, 33.
- Distinction, with respect to validity, between covenants to establish and maintain railway stations for the public convenience and those to establish and maintain sidings for private use only. *Whalen v. Baltimore & O. R. Co. (Md.)*, 33.
- Equity will not compel defendant to maintain a train service over certain abandoned line past the siding in question, and relief must be sought in a court of law for damages. *Whalen v. Baltimore & O. R. Co. (Md.)*, 33.
- Validity of contract requiring railroad to construct and maintain siding at designated point. *Whalen v. Baltimore & O. R. Co. (Md.)*, 33.

STATIONS AND DEPOTS.

See LICENSEES; SPURS AND SIDE TRACKS.

- Adequacy of the lighting at a railroad station is ordinarily a question for jury, under proper instructions. *Pere Marquette R. Co. v. Strange (Ind.)*, 66.
- Approach to depot which carrier is required to keep in safe condition, certain culvert did not constitute. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.
- Complaint stated a case of a passenger leaving a train by a route which he, as well as passengers in general, were invited by the carrier to use, and a cause of action based on the unsafety of such route. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.
- Duty of railroad to keep in safe condition all portions of its depot, platforms, and approaches thereto, to which the public will naturally resort, and all portions of its station grounds reasonably near to such platforms, where passenger will naturally go. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.
- Duty to light stations and depots grounds. *Pere Marquette R. Co. v. Strange (Ind.)*, 66.
- Duty to maintain safe passageway for passengers to any particular hotel. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.
- Evidence showed that passengers using pathway across railroad right of way did not use it on invitation of carrier; and persons using it could not recover for injuries received in consequence of defective condition of such pathway. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.
- Liability of carrier on account of statement of station agent, made to a passenger at night, when going into depot to deposit his grip, that a hotel man was there with a light, and that if the passenger would hurry he could catch up with him. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.
- Mere acquiescence by railroad in use of its track by passengers at a place 235 yards from the depot, while they were going to a hotel, did not make it liable to them beyond its liability to mere licensees. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.
- Petition did not state good cause of action for recovery of the land, which had been conveyed to the predecessors in title of defendant railroad for certain railroad purposes, but a portion of which, it was alleged, was occupied for private purposes by permission of defendant. *Harrold v. Seaboard A. L. Ry. (Ga.)*, 720.
- Scope of station agent's authority to suggest to or invite passengers to go to any particular hotel, or to follow any particular route in reaching such hotel. *Alabama, etc., R. Co. v. Godfrey (Ala.)*, 421.

STATUTES.

See RAILROADS.

STOCK, INJURIES TO.

Duty to check speed of train when stock is seen near track. *Rio Grande W. Ry. Co. v. Boyd* (Colo.), 741.

Evidence.

Error in excluding evidence showing that the railroad right of way fence in which the injured animal became entangled was being constructed by an independent contractor. *Missouri, etc., R. Co. v. Ferguson* (Okl.), 27.

Testimony as to how far from the crossing the witness could see an animal in the highway approaching the crossing. *Rio Grande W. Ry. Co. v. Boyd* (Colo.), 741.

Presumption of Negligence.

That plaintiff did not rely alone on the Colo. Stock Acts, § 5, creating a presumption of negligence from the killing of an animal by a train at a crossing, did not change the rule of burden of proof. *Rio Grande W. Ry. Co. v. Boyd* (Colo.), 741.

Proximate cause where trainmen could have discovered animal in time, and owner was guilty of contributory negligence in turning it into the highway near the railroad crossing. *Rio Grande W. Ry. Co. v. Boyd* (Colo.), 741.

Sufficiency of circumstances to apprise engineer or fireman that there was danger of the animal in question going on the crossing. *Rio Grande W. Ry. Co. v. Boyd* (Colo.), 741.

Sufficiency of testimony to establish that person served with notice of the killing of plaintiff's animal was the ticket or station agent of the railroad company, so as to meet the requirement of Colo. Stock Act, § 6. *Rio Grande W. Ry. Co. v. Boyd* (Colo.), 741.

STREET RAILWAYS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; IMPUTED NEGLIGENCE; NEGLIGENCE; RAILROADS; TAXATION; TICKETS AND FARES.

Abutting property owner had no right to complain, where street railway merely used a street already occupied by existing railway, and did not intend to construct a line of its own on the street. *Hannum v. Media, etc., Co.* (Pa.), 406.

Additional Servitude.

Distinction between "railroad" and "street railway." *Ecorse v. Jackson, etc., Ry.* (Mich.), 710.

Certain amendment relating to street railways was not germane to purposes of the general railroad law of Michigan, and, therefore, certain statute was unconstitutional. *Ecorse v. Jackson, etc., Ry.* (Mich.), 710.

Certain course of legislation contemplated that defendant street railway might discontinue operations subject to certain control by public officials, and the discontinuance of operation of the railway in question was not "without right or lawful excuse." *Selectmen v. Citizens' Elec. St. Ry. Co.* (Mass.), 382.

Contributory Negligence.

Driver of vehicle can neither drive on crossing in a race with street car, nor is he arbitrarily required to stop and await its passage. *Adam v. Union Electric Co.* (Iowa), 218.

It could not be said as a matter of law that a prudent man would have backed his vehicle from the track or attempted to drive across when he saw a car which he had seen at distance, coming at excessive speed at but 20 or 30 feet away. *Adam v. Union Electric Co.* (Iowa), 218.

One, in attempting to drive across street railway tracks, should

STREET RAILWAYS—Continued.

- use due care to see whether he can cross in safety. *Carrahan v. Boston & N. St. Ry. Co. (Mass.)*, 750.
- Question for jury, in action for injury caused by street car striking wagon. *Carrahan v. Boston & N. St. Ry. Co. (Mass.)*, 750.
- Rearman on covered wagon, injured in a collision between it and car, was not negligent. *Paducah Traction Co. v. Sine (Ky.)*, 755.
- Right to drive vehicle across track in front of approaching car. *Adam v. Union Electric Co. (Iowa)*, 218.
- When question for jury where collision between street car and another vehicle, where driver of latter saw the car approaching before he drove upon the track at a street crossing. *Adam v. Union Electric Co. (Iowa)*, 218.
- Duty of those in charge of cars to lookout for other vehicles. *Paducah Traction Co. v. Sine (Ky.)*, 755.
- Duty to operate railway. *Selectmen v. Citizens' Elec. St. R. Co. (Mass.)*, 382.
- Enjoin railway from asserting its right to use and occupation of street, right of citizens to. *Andel v. Duquesne St. Ry. Co. (Pa.)*, 400.
- Fraud in securing consent of some property owners to the construction of interurban railroad upon highway, effect of. *Ecorse Tp. v. Jackson, etc., Ry. (Mich.)*, 710.
- If street railway's charter simply authorizes it to construct its road to certain point, without requiring it to do so, it cannot be compelled to complete or maintain its road to that point when it would not be remunerative to do so. *Selectmen v. Citizen's Elec. St. R. Co. (Mass.)*, 382.
- Implied charter right to use tracks of another street railway for short distance under a contract with latter. *Hannum v. Media, etc., Ry. Co. (Pa.)*, 406.
- Lights, electric cars should be provided with. *Briggs v. Durham Traction Co. (N. Car.)*, 324.
- Negligence of motorman in running his car against wagon was question for jury. *Carrahan v. Boston & N. St. Ry. Co. (Mass.)*, 750.
- Petition could be maintained under certain statute to compel defendant street railway to resume operation, even though such statute was enacted after it had abandoned the railway. *Selectmen v. Citizens' Elec. St. R. Co. (Mass.)*, 382.
- Right of company to use streets, who may question. *Andel v. Duquesne St. Ry. Co. (Pa.)*, 400.
- Street railway company is bound to exercise its franchises for the benefit of the public, and not merely for its own profit. *Selectmen v. Citizens' Elec. St. R. Co. (Mass.)*, 382.
- When motorman sees one driving towards the track, so that if both pursue their course a collision between the car and the other vehicle will ensue, he must stop his car, though the other vehicle ought not to proceed. *Carrahan v. Boston & N. St. Ry. Co. (Mass.)*, 750.

STREETS AND HIGHWAYS.

See RAILROADS IN STREETS; STREET RAILWAYS.

TAXATION.

See LOCAL ASSESSMENTS.

- Inviolable contract between municipality and street railway companies which will prevent exaction of license tax, whether created by ordinances, under which they agreed to pay certain sum for

TAXATION—Continued.

use of streets for given period, where the ordinances do not expressly relinquish right to exact license fees or taxes. *City of St. Louis v. United Rys. Co. (U. S.)*, 687.

TICKETS AND FARES.

See BAGGAGE; CARRIERS OF PASSENGERS; RAILROADS; SLEEPING CAR COMPANIES.

- Acceptance of ticket renders passenger bound by its terms whether he reads it or not. *French v. Merchants' & Miners' Transp. Co. (Mass.)*, 608.

Carrier not estopped to deny passenger's right of transportation contrary to terms of his contract by reason of acts of its conductor in previously accepting such contract. *Johnson v. Michigan United Rys. Co. (Mich.)*, 346.

Constitutionality of statute requiring railroads to issue mileage books. *Parish v. Ulster & D. R. Co. (N. Y.)*, 349.

Constitutionality of statute requiring 1,000-mile family tickets to be sold. *State v. Great Northern Ry. Co. (N. Dak.)*, 513.

Contributory Negligence.

Sleeping car company's lack of authority to waive conditions of railroad passenger ticket, passenger was chargeable with notice of. *Calhoun v. Pullman Co. (C. C. A.)*, 173.

Evidence.

Evidence that defendant's conductor had accepted a mileage book issued by another company was admissible as tending to show that defendant had assumed the contract. *Johnson v. Michigan United Rys. Co. (Mich.)*, 346.

Excuse of passenger for not acquainting herself with contents of ticket, sufficiency of. *French v. Merchants' & Miners' Transp. Co. (Mass.)*, 608.

Free Pass.

"Anti-Pass Law" of Nebraska, certain contract between railroad and a physician employed by it is prohibited by. *State v. Martyn (Neb.)*, 136.

"Anti-Pass Law" of Nebraska is a valid exercise of the police power of the state. *State v. Martyn (Neb.)*, 136.

In action for breach of contract contained in mileage book issued by another company, evidence tended to show an assumption of the contract by defendant. *Johnson v. Michigan United Rys. Co. (Mich.)*, 346.

Passenger was bound to know from wording of railroad ticket, that sleeping car company's agent had no authority to agree that the ticket would be acceptable for transportation to W. without being countersigned in N. Y., and might be countersigned in W. *Calhoun v. Pullman Co. (C. C. A.)*, 173.

Plaintiff was not bound to insist upon the issuance of a mileage book in strict accordance with the statute in question, and sue for the statutory penalty if it was refused, on penalty, if she accepted the ticket as issued, of becoming bound by its limitations, but the company having received the full price of the mileage book as fixed by statute, there was no consideration for any agreement by plaintiff to limit its use further than prescribed by the statute, and plaintiff was not bound by the additional limitation in question. *Parish v. Ulster & D. R. Co. (N. Y.)*, 349.

Transfers.

"An aggrieved" party under statute requiring street railways to give transfers under certain circumstances, person who boarded car merely to seek information as to the custom of the corpora-

TICKETS AND FARES—Continued.

tion to issue or not to issue transfers at certain point was not. *Bull v. New York City Ry. Co. (N. Y.), 154.*

"Continuous trip," what constitutes, under certain statute. *Kelly v. New York City Ry. Co. (N. Y.), 368.*

Prima facie showing that plaintiff was on one of defendant's cars, and that one of its conductors refused to give her a transfer. *South Covington & C. St. Ry. Co. v. Quinn (Ky.), 508.*

Refusal to give transfer as a refusal to transport person to her destination. *South Covington & C. St. Ry. Co. v. Quinn (Ky.), 508.*

What constitutes "main line of road and any branch or extension thereof," under certain statute. *Bull v. New York City Ry. Co. (N. Y.), 154.*

TRANSFERS.

See **TICKETS AND FARES.**

TRESPASSERS.

See **CARRIERS OF PASSENGERS; CHILDREN; LICENSEES.**

Ejection.

Forcible ejection by conductor of trespasser from rapidly moving train renders railroad responsible for resulting injury. *Williams v. Louisiana Ry., etc., Co. (La.), 240.*

Owner owes no duty to trespasser to make his premises safe. *Alabama Great Southern R. Co. v. Godfrey (Ala.), 421.*

Who Are.

Person assisting in making of train was not a trespasser, but a volunteer. *Clarke v. Louisville & N. R. Co. (Ky.), 542.*

ULTRA VIRES.

See **LEASES AND RUNNING POWERS.**

VENUE.

See **RAILROADS.**

VOLUNTEERS.

See **MASTER AND SERVANT; TRESPASSERS.**

WAREHOUSEMAN.

See **BILLS OF LADING; COMMON CARRIERS.**

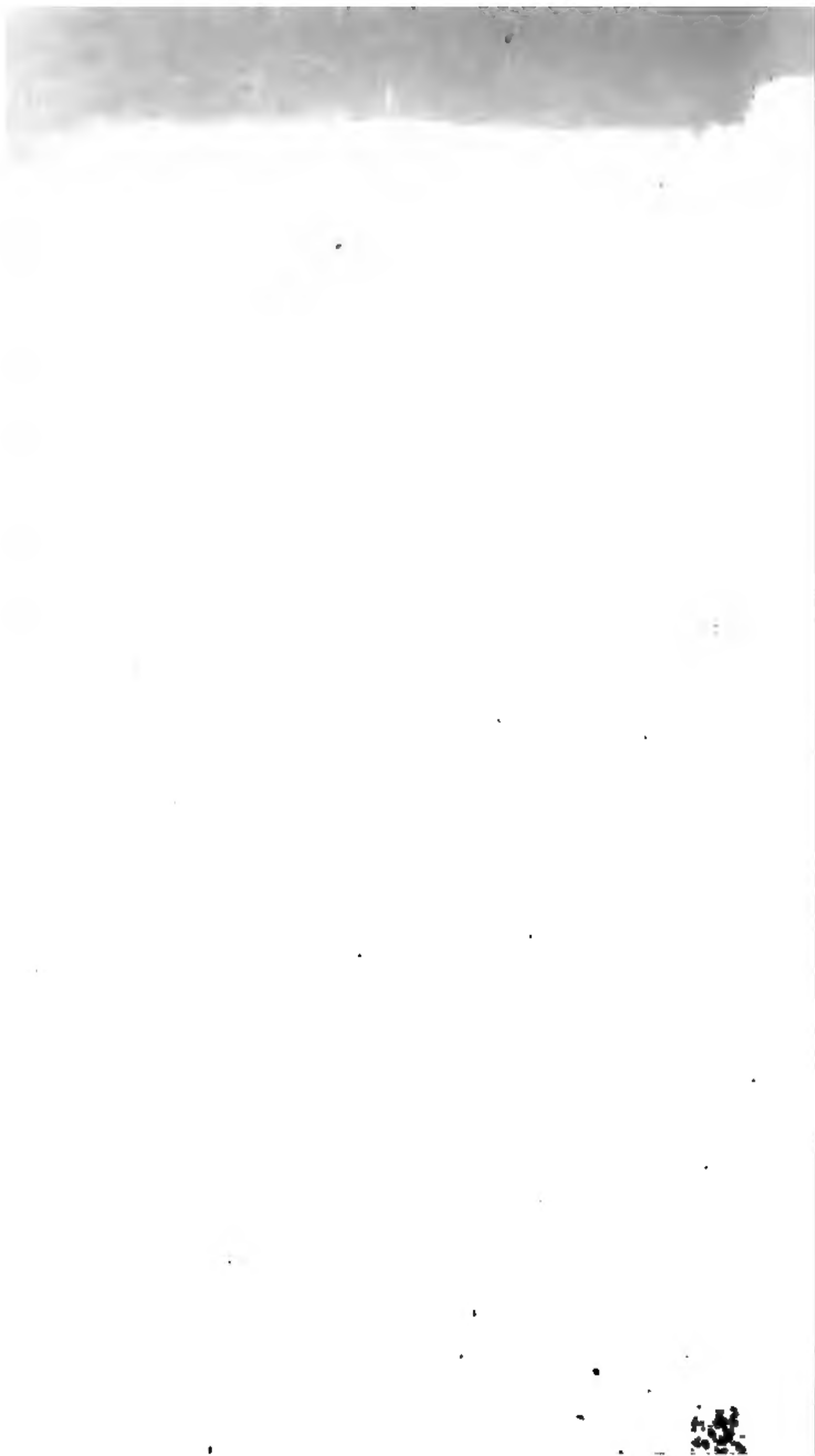
WATER AND WATERCOURSES.

Accrual of cause of action for negligent construction of railway, resulting in discharge of surface water upon adjoining land. *Morse v. Chicago, etc., Ry. Co. (Neb.), 396.*

Duty of railroad to reconstruct drain, which has become inadequate, to prevent water from flowing into street over which it has an overhead crossing. *Mayor, etc., v. Pennsylvania R. Co. (N. J.), 675.*

WITNESSES.

Was proper to cross-examine defendant's conductor to show that his failure to make a report as required by the rules was because a truthful report would have shown his own misconduct. *Sullivan v. Boston Elev. Ry. Co. (Mass.), 322.*



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